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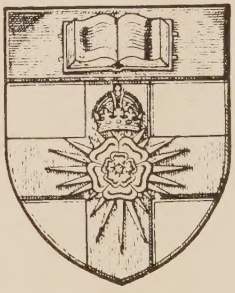

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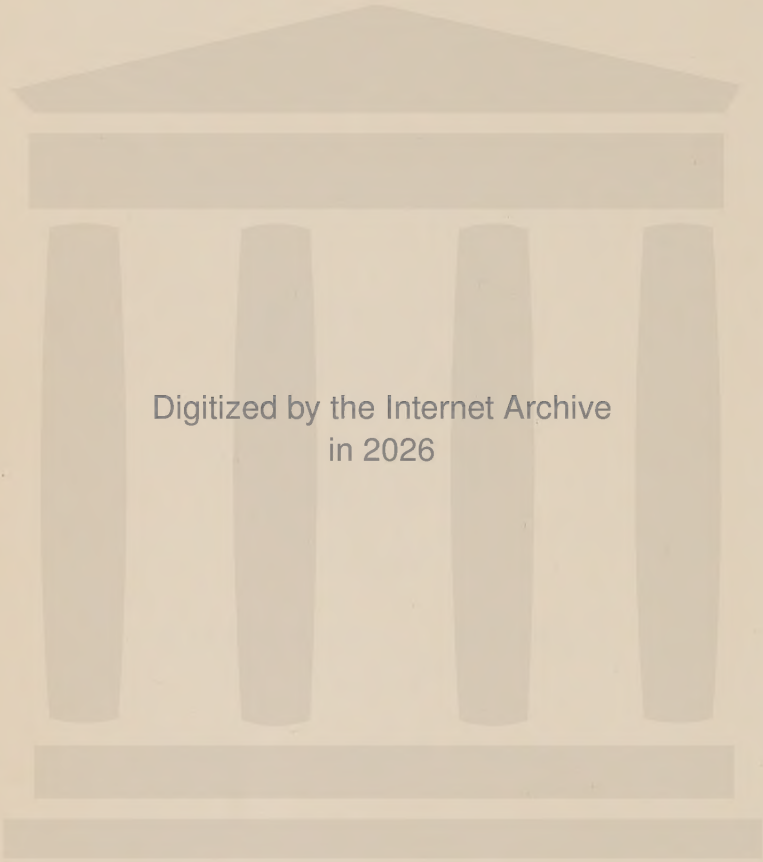
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CASES

DETERMINED BY THE

QUEEN'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT FOR CROWN CASES RESERVED

AND BY THE

RAILWAY AND CANAL COMMISSION.

1895. 1896.

DRAX *v.* FFOOKS.

1895
Nov. 11.

Local Government—Parochial Elector—Ownership—Qualification—Woman—Local Government Act, 1894 (56 & 57 *Vict. c.* 73).

A married woman is not qualified by reason of her ownership of property within a parish to be a parochial elector of the parish; for the provision of s. 43 of the Local Government Act, 1894 in favour of married women does not create a new qualification.

APPEAL from the decision of a revising barrister.

The appellant, a married woman, claimed to be placed on the parochial electors' list for the parish of Milborne St. Andrew, in the county of Dorset, in respect of the ownership of property in the parish. The revising barrister disallowed the claim on the ground that by s. 2, sub-s. 1, of the Local Government Act, 1894 (1), parochial electors are to consist of

(1) By the Local Government Act, 1894, s. 2, sub-s. 1, "The parish meeting for a rural parish shall consist of the following persons, in this Act referred to as parochial electors, and no others, namely, the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish."

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DRAX v. FFOOKS.

persons who are on either the local government or the parliamentary registers, that ownership of property is no qualification for being on the former, and that the claimant was disqualified for being on the latter by reason of her sex. The claimant appealed.

Macmorran, for the appellant. This question has given rise to a great difference of opinion amongst revising barristers. It is contended that s. 43 of the Local Government Act, 1894 (1), shews the intention of the Legislature to have been that a woman should be qualified by virtue of the ownership of property for being an elector of the kinds therein specified; the proviso that husband and wife shall not both be qualified in respect of the same property assumes that a woman may be so qualified. Then one of the kinds of electors mentioned in the section is "an elector of any local authority." That expression includes parochial electors, the parish council being the local authority of the parish.

No counsel appeared for the respondent.

LORD RUSSELL of KILLOWEN C.J. The question in this case is whether a married woman can in respect of her ownership of property in a parish be regarded as qualified to have her name placed on the register of parochial electors of the parish. The question turns on certain sections of the Local Government Act, 1894. Sect. 2, sub-s. 1, of that Act enacts that the parochial electors are to be made up of two classes—first, those persons who are on the portion of the local government register relating to the parish; and, secondly, those persons who are on the portion of the parliamentary register relating to the parish. And s. 44 says that those two registers, so far as they relate to a parish, shall together form the register of parochial electors. Now, in order to get on the local government register, a qualification by occupation and rating is essential. For the purposes of that register the mere owner-

(1) By s. 43, "For the purposes of this Act a woman shall not be disqualified by marriage for being on any local government register of electors, or for being an elector of any local authority, provided that a husband and wife shall not both be qualified in respect of the same property."

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Lord Russell C.J.

ship of property is no qualification, and it is only in respect of ownership that this lady claims. Nor was she entitled to be on the parliamentary register, for she was disqualified for being on that register by reason of her sex.

But then we were referred to s. 43, which provides that "For the purposes of this Act a woman shall not be disqualified by marriage . . . . for being an elector of any local authority, provided that a husband and wife shall not both be qualified in respect of the same property." And it was argued that that section imported that a woman might be qualified by the ownership of property for being an elector of any local authority, under which term it was said that a parish council was included. It is enough, however, to say that that section does not profess to give any qualification: it only says that if a woman has otherwise a qualification the fact of her being married shall not take it away.

GRANTHAM J. I am of the same opinion.

VAUGHAN WILLIAMS J. I also concur. It is to be observed that this lady is not disqualified directly by reason of her sex, but because she is not upon the parliamentary register. It may be that the reason why she is not on the parliamentary register is because of her sex, but the immediate reason why she is not qualified to be on the register of parochial electors is that she is not on the parliamentary register.

Appeal dismissed.

Solicitors for appellant: *Bell, Brodrick & Gray, for Parker, Blandford.*

J. F. C.

Referred to. R. *v.* PEARCE. [1951] 1 All E.R. 493.

1895
Nov. 23.

[CROWN CASE RESERVED.]

THE QUEEN *v.* JONES AND BOWERBANK.

Criminal Law—Procuring Commission of Act of Gross Indecency—"Another male person"—Criminal Law Amendment Act, 1885 (48 & 49 *Vict. c.* 69), *s.* 11.

By s. 11 of the Criminal Law Amendment Act, 1885, "any male person who . . . . procures . . . . the commission by any male person of any act of gross indecency with another male person shall be guilty of a misdemeanour :—

Held, that where the prisoner had procured the commission by another male person of an act of gross indecency with the prisoner himself the offence was complete.

CASE stated by Wills J. for the opinion of the Court for Crown Cases Reserved.

"Robert Jones and Harry Lewis Bowerbank were tried before me at Exeter on November 13, 1895, on an indictment containing the following counts :—

"(1.) That Robert Jones on September 6, 1895, with force and arms, at the parish of Littleham-cum-Exmouth, in the county of Devon, being a male person, unlawfully did commit an act of gross indecency with another male person, to wit, Harry Lewis Bowerbank, against the form of the statute in such case made and provided.

"(2.) That the said Harry Lewis Bowerbank, on the same day, in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, being a male person, unlawfully did commit an act of gross indecency with another male person, to wit, the said Robert Jones, against the form of the statute in such case made and provided.

"(3.) That the said Robert Jones on the same day, in the year aforesaid, at the parish aforesaid, in the county aforesaid, being a male person, unlawfully did procure the commission by a male person, to wit, the said Harry Lewis Bowerbank, of an act of gross indecency with another male person, to wit, with him the said Robert Jones, against the form of the statute in such case made and provided.

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"The counsel for the prosecution offered no evidence against Bowerbank, and a verdict of not guilty was returned in respect of the second count. The trial against Jones then proceeded. Bowerbank was called as a witness, and a general verdict of guilty was returned against Jones, who was sentenced to nine months' imprisonment with hard labour, which he is now undergoing.

"Counsel for the prisoner took, at the close of the case for the prosecution, the following objections:—

"(1.) That, the prisoners being charged and tried on the same indictment, the jury could not, having acquitted Bowerbank on the second count, convict Jones on either the first or the third counts, the offences charged being joint and requiring the participation of both prisoners in the act.

"(2.) That the third count was bad, and should have been quashed, on the ground that it is not made by the Act (1) an indictable offence for one male person to procure the commission by a second male person of an act of indecency with himself the first of such male persons.

"I was of opinion with regard to the first objection that the offence charged was not a joint one, and that it was quite possible in respect of such an indictment to have evidence which would establish the case against one defendant and not against the other, though the act constituting the crime might involve the participation of both.

"As to the second objection I expressed no opinion, but reserved both points. Judgment has been entered on each count. As there were no merits in the objections, and the case was clearly established, I did not respite judgment. The question for the Court is whether the conviction is to stand upon either the first or third count."

No counsel appeared.

(1) By the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), s. 11, "Any male person who in public or private commits or is a party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanour."

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LORD RUSSELL of KILLOWEN C.J. Two questions are raised by this case. The first count of the indictment charges Robert Jones with having committed an act of gross indecency with Harry Lewis Bowerbank; and it was objected that the jury, having acquitted Bowerbank, who was charged in the second count of the same indictment with the commission of a similar act with Robert Jones, could not afterwards convict Jones. There is, however, on the face of the indictment nothing to shew that the offence, which the first count charges Jones with having committed with Bowerbank, is the same offence which the second count charges Bowerbank with having committed with Jones. It does not seem to me that there is anything in the Act which requires that both offenders should be before the Court before there can be a conviction for this offence. I think that there is nothing in this objection.

The second objection is based on the language of s. 11 of the Criminal Law Amendment Act, 1885, and it is said that because the Act uses the expression "another male person" that person cannot be the person who procures the commission of the offence, but must be some third person. That does not seem to me to be the proper construction of the section. I think that the person who procures the commission of the offence may himself be the person with whom it is committed. That objection therefore also fails, and the conviction stands.

MATHEW, VAUGHAN WILLIAMS, WRIGHT and BRUCE JJ. concurred.

Conviction affirmed.

A. P. P. K.

THE LONDON AND RIVER PLATE BANK, LIMITED *v.* THE BANK OF LIVERPOOL, LIMITED, AND OTHERS.

1895
Nov. 4, 6.

Bill of Exchange—Forged Indorsement—Payment to bonâ fide Holder—Right to recover Money.

When a bill becomes due and is presented for payment, and is paid in good faith and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries.

ACTION tried without a jury before Mathew J. in the Commercial Court.

On April 18, 1893, Hippolyto Garcia, a merchant in Monte Video, purchased, at the plaintiffs' branch establishment in Monte Video, a draft at 120 days' date, drawn on the plaintiffs in London, for 261*l.* 0*s.* 11*d.*, and made payable to the order of Fueyo & Co. The bill was drawn as usual in three parts, and on April 19 Hippolyto Garcia sent the first of exchange to his correspondents, Fueyo & Co., in Havannah, in payment of an account. On April 22 he wrote again to them, sending the second of exchange. Neither of these letters ever reached Fueyo & Co. On June 20 a person calling himself Pedro Garcia was introduced to Messrs. Loychate & Co. of Havannah. He produced the first and second of exchange of the draft purchased by Hippolyto Garcia at Monte Video on April 18, and he asked Loychate & Co. to discount the bill. The bill then bore indorsements of which the following are translations: "Pay to the order of Don Hippolyto Garcia. Monte Video, April 18, 1893. Fueyo & Co." "Pay to the order of Don Pedro Garcia. Monte Video, April 20, 1893. Hippolyto Garcia." Both those indorsements subsequently proved to be forgeries.

At the request of Loychate & Co. the so-called Pedro Garcia indorsed the bill, "Pay to the order of Messrs. Larrinaga & Co., value in account with Messrs. Loychate & Co. June 20, 1893. Pedro Garcia."

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Loychate & Co. informed Pedro Garcia that they could not discount the bill until they knew whether it would be accepted; and on June 21 they wrote to Larrinaga & Co., enclosing the first and second of exchange, and asking them to telegraph when the bill was accepted. The bill was received by Larrinaga & Co. in Liverpool on July 6, and was presented by them for acceptance at the head office of the plaintiffs on July 7, and was accepted. On July 10 Larrinaga & Co. telegraphed to Loychate & Co. that the bill had been accepted; and the next day Loychate & Co. paid to Pedro Garcia the discounted amount of the bill.

Pedro Garcia then disappeared, and could not now be found.

On July 12 Larrinaga & Co. wrote to Loychate & Co., acknowledging the receipt of the bill, "with which we credit your account subject to payment."

On July 31 Larrinaga & Co. paid the bill into their account at the Bank of Liverpool, and that bank passed the proceeds to the credit of Larrinaga & Co., who drew against the bill.

On August 19 the bill was presented for payment to the plaintiffs by Messrs. Glyn, Mills, Currie & Co., as agents for the Bank of Liverpool. It was paid by the plaintiffs; and the money was transmitted by Messrs. Glyn, Mills, Currie & Co. to the Bank of Liverpool.

On September 22 Messrs. Fueyo & Co. wrote to Hippolyto Garcia, asking for payment of their account; and on October 27 he replied, telling them what he had done on April 18 and 22, and sending the third of exchange. This reached the hands of Fueyo & Co.; and after some correspondence it was presented to the plaintiffs in London, and was accepted and paid by them on July 19, 1894. They then commenced this action against Glyn, Mills, Currie & Co., the Bank of Liverpool, and Larrinaga & Co., for the return of 261*l.* 0*s.* 11*d.*, as money received by the defendants for the use of the plaintiffs.

The action was discontinued as against Glyn, Mills, Currie & Co., and now came on to be tried as against the other two defendants.

Bigham, Q.C., and *Boydell Houghton*, for the plaintiffs. The

plaintiffs can recover this money back. The defendants no doubt acted bonâ fide in presenting the bill, but they had no title to it. There was no negligence on the part of the plaintiffs in accepting and paying it. The money was paid under a mistake; and the rule in such cases is that where there is no negligence or constructive negligence on the part of the person paying the money so paid can be recovered. This is the principle underlying all the decisions: *Price* v. *Neal* (1); *Smith* v. *Mercer* (2); *Wilkinson* v. *Johnson* (3); *Milnes* v. *Duncan* (4); *Cocks* v. *Masterman*. (5) [They also referred to the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 24, 54, and 59.]

T. G. Carver, for both defendants. The money cannot be recovered back. The principle is laid down in *Cocks* v. *Masterman* (5) that money paid under a mistake to a bonâ fide holder of a bill cannot be recovered where the position of the payee is altered before the discovery of the mistake. In this case the defendants are too late to give notice of dishonour of the bill, and have lost recourse against prior indorsees. The plaintiffs cannot have judgment against both defendants, but must elect against which they will proceed.

Bigham, Q.C., replied.

Cur. adv. vult.

Nov. 6. MATHEW J. This is an action brought by the plaintiffs to recover from the Bank of Liverpool and from a firm of Larrinaga & Co. the sum of 261*l.* 0*s.* 11*d.*, the amount of a draft, which had been accepted by the plaintiff bank and which they paid, but which they allege they paid under a mistake of fact. It appeared, a long time after payment had been made, that the indorsements on the draft were forgeries. It followed that the plaintiffs were not liable upon the draft at the time that they paid it. It is admitted that the Bank of Liverpool and Larrinaga & Co. had become possessed of the bill in good faith, and, so far as they were concerned, they were as ignorant as the plaintiffs of the fact that the indorsements

(1) 3 Burr. 1355.
(2) 6 Taunt. 76.
(3) 3 B. & C. 428.
(4) 6 B. & C. 671.
(5) 9 B. & C. 902.

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were forged. [The learned judge then stated the facts set out above, and proceeded :—]

The learned counsel for the plaintiffs argued that if it could be shewn that the plaintiffs had not been negligent when they paid the money over, it might be recovered from the Bank of Liverpool or from Larrinaga & Co. It was agreed that there was no evidence of negligence on the part of the plaintiffs ; that when they paid the bill they paid it under the impression that it was a genuine bill, and that there were no means whatever of ascertaining that the indorsements on the bill were forgeries. It was said that the substance of the rule, that where there was no negligence in a case of this sort, the acceptor paying a forged bill could get the money back, was recognised in the early case of *Price* v. *Neal*. (1) In that case the acceptor of the bill (I am referring to one only of the two bills mentioned in the judgment), in the belief that the signature of the drawer was genuine, paid the amount. The bill turned out to be a forgery. In an action to recover the money paid to the holder, Lord Mansfield is reported to have said that the acceptor was bound to know the drawer's handwriting. From that it was argued that the foundation of the liability of the plaintiffs in such a case was negligence, and that if there was no negligence the acceptor was entitled to recover the money back. But that is not the decision. If the forgery was cleverly executed, reasonable care would not enable the acceptor to know that it was a forgery ; and it would seem extraordinary that the right of the acceptor to recover the money paid to the holder should depend upon whether or not the forgery was cleverly executed. That is what it comes to. It was not said in that case that there had been negligence. Nor was it said that if there had been no negligence the action would lie. Neither of those propositions is laid down, and one or the other of them would have been indispensable to the position taken up by the learned counsel for the plaintiffs in this case. It seems to me the principle underlying the decision is this : that if the plaintiff in that case so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine, he could not

(1) 3 Burr. 1355.

afterwards withdraw from that position; and no single case has been produced in which, where payment has been made on a forged indorsement to the holder of it in good faith, the money has been recovered back. This case was followed by another case, *Smith* v. *Mercer* (1), where it was said in the course of some of the judgments that, where a banker had paid a forged draft believing that it had been accepted by his customer, he ought to know his customer's signature. The same observations that I have made apply to that case. He may not be able by any amount of care to ascertain whether or not the acceptance was a forgery. That case, therefore, does not establish the principle for which Mr. Bigham contended. The true principle is developed in the clearest possible form in the case of *Cocks* v. *Masterman*. (2) There was an intermediate case of *Wilkinson* v. *Johnson* (3), which stands by itself, and which we need not discuss. In *Cocks* v. *Masterman* (2) the simple rule was laid down in clear language for the first time that when a bill becomes due and is presented for payment the holder ought to know at once whether the bill is going to be paid or not. If the mistake is discovered at once, it may be the money can be recovered back; but if it be not, and the money is paid in good faith, and is received in good faith, and there is an interval of time in which the position of the holder may be altered, the principle seems to apply that money once paid cannot be recovered back. That rule is obviously, as it seems to me, indispensable for the conduct of business. A holder of a bill cannot possibly fail to have his position affected if there be any interval of time during which he holds the money as his own, or spends it as his own, and if he is subsequently sought to be made responsible to hand it back. It may be that no legal right may be compromised by reason of the payment. For instance, the acceptor may pay the bill and discover on the same day that the bill is a forgery, and so inform the holder of it, so that the holder would have time to give notice of dishonour to the other parties to the bill; but even in such a case it is manifest that the position of a man of business may be

(1) 6 Taunt. 76.

(2) 9 B. & C. 902.

(3) 3 B. & C. 428.

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most seriously compromised, even by the delay of a day. Now that clear rule is one that ought not to be tampered with. It is one of the few rules of business which is perfectly clear and distinct at present, and, as it seems to me, it is unimpeachable. The rule has been recognised in the case of *Mather* v. *Maidstone*. (1) In the particular case before me there cannot be a question that the position of the Bank of Liverpool would be seriously compromised if they were now compelled to repay this money, because it was not until months after that it was discovered that there was anything wrong with the bill, and meanwhile the Bank of Liverpool had lost their right of giving notice to Larrinaga & Co. that the bill had not been paid.

That leads me to refer to what was discussed by Mr. Carver, namely, the exact position of the Bank of Liverpool in the matter. The Bank of Liverpool and Larrinaga & Co. are both made defendants, and the plaintiffs' counsel was called upon to elect as to which he would proceed against. If Larrinaga & Co. had handed the bill for collection to the Bank of Liverpool Larrinaga & Co. would be the proper defendants on the assumption of liability; if, on the other hand, the Bank of Liverpool were the holders of the bill by indorsement from Larrinaga & Co., the Bank of Liverpool would be the persons to sue, on the same assumption of liability.

In this case I am satisfied that the Bank of Liverpool were holders of the bill, that payment was made to them, and that they are entitled to retain the money. Therefore I think this action fails; and I give judgment for the defendants with costs.

Judgment for defendants.

Solicitors for plaintiffs: *Bompas, Bischoff, Dodgson, Coxe & Bompas.*

Solicitors for defendants: *Wynne, Holme & Wynne, for Forshaw & Hawkins, Liverpool.*

(1) 18 C. B. 273.

A. P. P. K.

In re NASH & SONS.
Ex parte CROFTON, CRAVEN & WORTHINGTON.

1895
Oct. 27.

Bankruptcy—Taxation of Costs of Trustee's Solicitor—Right of Official Receiver to attend—Bankruptcy Rules, 1886 *and* 1890, *r.* 122.

An official receiver has no right, without the leave of the Court, to be present at the taxation of the bill of costs of the solicitor of a trustee in bankruptcy. The registrar or the judge (as the case may be) may, however, if he thinks fit, give the official receiver leave to attend such taxation, not as a litigant, but merely for the purpose either of assisting the trustee or the taxing master by his advice, or of enabling him to report on the taxation to the Board of Trade.

APPEAL from the decision of the county court judge of Lancashire sitting at Manchester.

The bankruptcy occurred in May, 1894, and a trustee and a committee of inspection were appointed. In December, 1894, Messrs. Crofton, Craven & Worthington, who had acted as solicitors to the trustee, carried in their bill for taxation. The registrar refused to tax the bill until the official receiver had applied under rule 122 of the Bankruptcy Rules for a copy of the bill of costs, and had called the attention of the trustee to any items which in his opinion ought to be disallowed or reduced. (1)

On April 5, 1895, the county court judge made an order directing the official receiver within twenty-eight days to apply for a copy of the bill of costs and to call the attention of the trustee to any items which in his opinion ought to be disallowed or reduced.

The official receiver accordingly obtained a copy of the bill of costs, and, as on consideration of it he found that the items,

(1) By the Bankruptcy Rules, 1886 and 1890, r. 120, "Every person whose bill or charges is or are to be taxed shall in all cases give not less than seven days' notice of the appointment to tax the same to the official receiver and to the trustee (if any)."

Rule 122: "Every person whose bill or charges is or are to be taxed shall, on application either of the official receiver or the trustee, furnish a copy of his bill or charges so to be taxed on payment at the rate of 4*d.* per folio, which payment may be charged to the estate. The official receiver shall call the attention of the trustee to any items which in his opinion ought to be disallowed or reduced."

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to which he would have to call the attention of the trustee, were very numerous, he proposed to attend the taxation personally and to call the attention of the trustee, and also of the registrar, to those items while the taxation was proceeding. The registrar referred the question to the judge, who held that it was convenient that the official receiver should appear at the taxation, and made an order accordingly.

From this order the solicitors appealed.

Cooper Willis, Q.C., for the solicitors. The official receiver had no right to appear at the taxation. His duty is strictly limited by the rules, and consists merely in calling the attention of the trustee to any items which in his opinion ought to be disallowed or reduced. If it was intended that he should attend the taxation the rule would have said so, as is the case in rule 25 of the Companies (Winding-up) Rules, 1890, which, after repeating the words of rule 122, "the official receiver shall call the attention of the liquidator to any items which in his opinion ought to be disallowed or reduced," goes on to add, "and may attend or be represented on the taxation." Here the official receiver was not a party to the proceedings, and had therefore no right to attend the taxation.

Even, however, if he has the right to attend he cannot take any part in the taxation. At the utmost, he can only call the trustee's attention to the items to which he objects; and it must be for the trustee in his discretion to decide whether or not he will take objection to such items.

C. A. Russell, for the trustee.

Muir Mackenzie, for the official receiver. The official receiver would not have taken any part in this taxation had he not been compelled to do so by the order of the county court judge on April 5. Acting under that order, he finds a very large number of items to which he desires to call the attention of the trustee, and he thinks it will be more convenient that he should do so at the taxation rather than by putting them into writing or at a prior interview. He does not desire to appear as a litigant, but he claims the right in this case to attend the taxation and assist the trustee and the registrar in carrying it out. He is an

officer of the Court, and as such he has a right to be present. Rule 25 of the Companies (Winding-up) Rules, 1890, gives the official receiver power to attend as a litigant, which he does not claim here.

Cooper Willis, Q.C., replied.

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VAUGHAN WILLIAMS J. This is a case of some importance, because it touches a question which is likely to arise not unfrequently. There has been some difficulty in understanding how the matter came before the learned county court judge; but all parties are now agreed that the question which was intended to be decided between the parties was this: The learned county court judge had upon April 5 made an order that the official receiver within twenty-eight days should apply for a copy of the bill of costs of the solicitor to the trustee. Now, there can be no doubt that that was a direction which could properly be given to him, because rule 122 of the Bankruptcy Rules, 1886 and 1890, provides that "Every person whose bill or charges is or are to be taxed shall, on application either of the official receiver or the trustee, furnish a copy of his bill or charges so to be taxed on payment at the rate of 4*d.* per folio, which payment may be charged to the estate." So that there can be no doubt of the propriety of the order of the county court judge so far. Then the order of the county court judge went on: "And shall call the master's attention to any items in such bill of costs which in his opinion ought to be disallowed or reduced." This, again, is merely a following out of the very words at the end of s. 122: "The official receiver shall call the attention of the trustee to any items which in his opinion ought to be disallowed or reduced." The whole of the order of the learned county court judge of April 5 is unimpeachable. There it is. The bill of costs was applied for in obedience to this order, and was supplied. An appointment was made for taxation, and notice of the appointment was given under rule 120: "Every person whose bill or charges is or are to be taxed shall in all cases give not less than seven days' notice of the appointment to tax the same to the official receiver and the trustee." They are both to have notice. That notice was given, and thereupon the official receiver does attend. The

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official receiver thus attending, a question is raised by Mr. Cooper Willis's clients, the solicitors to the trustee, as to the right of the official receiver to be present. Apparently the official receiver conceived that it was his duty, not only to insist upon being present, but also upon his right to be heard. The registrar, bearing in mind the order of April 5, thought it better that this matter should be dealt with by the learned county court judge who made that order, and he referred the matter to him to be disposed of, and referred it, it seems to me rightly, under the powers of rule 9. Then it was for the county court judge to dispose of it; but I will deal with that in a moment. Before I do that I propose to deal with both these questions, which I understand to have been so referred by the registrar to the county court judge for decision: first, the right of the official receiver to be present at the taxation; and, secondly, the right of the official receiver to be heard.

I will deal with the second of these matters first. In my judgment, if these rules are looked at, the official receiver had no right whatever to be present and to be heard upon this taxation. The view that I take is one in accordance with the practice apparently of all Bankruptcy Courts, both in London and in the country. These rules have been in force for a long time, and rules not dissimilar were in force at an earlier period; but throughout that time, as I understand, no official receiver has ever put forward a claim to appear and be heard as of right upon such a taxation. But I go a step further. I not only say that in my judgment the official receiver would have no right to attend and be heard as of right, but I say that no order that the county court judge could make could give him that right in his character of official receiver.

Now, having said that, let me deal with the other question, Has the official receiver the right to be personally present? In my judgment he has no right to be personally present. If one looks at these rules, beginning at 120 down to 124—I may say in passing that one may omit rule 123, for it has nothing to do with the matter—if one looks at rules 120, 121, 122, and 124, it seems to me that it is not contemplated that the official receiver should attend taxations as of right. I quite recognise the expediency of the attendance of the official receiver in some

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cases, because it is obvious that the trustee and the solicitor to the trustee are not necessarily placed in such a position that the trustee will be a very jealous critic of the bill of a solicitor who is his own nominee. But, generally speaking, the acuteness of the taxing officer is sufficient to bring about a proper taxation. That is in accordance with the practice that has been established in all these courts. The official receiver has never claimed as of right to attend at such a taxation; and taxations have in fact always been conducted without his presence.

But that only disposes of one part of this question, because when it is said that the official receiver has no right to attend at the taxation it does not exclude the right of the Court to make an order that he should be at liberty to attend. He acts in a dual capacity. He is an officer of the Court; he is also the official of the Board of Trade. I have no doubt that it is within the inherent power of the Court to order that he shall attend at a taxation if the Court thinks it right—not attend as a litigant, not attend with a right to be heard—but attend to be consulted by the taxing master, if the taxing master thinks fit, or attend so that he may be able to report efficiently to the Board of Trade upon the questions of the taxation. One sees that this may be very necessary, for in the case of county court taxations the Board of Trade has a right to bring up the allocatur for review of taxation before the London taxing master, and it is very desirable, or might be very desirable, in many cases that the official receiver should be present at the taxation to know the grounds upon which the allocatur was granted. It seems to me, therefore, that the judge has the right, if he thinks fit, to make the order for him to attend.

Of course, the only person who can make an order that the officer of the Court shall attend the taxation is a person who has jurisdiction over that officer. If the official receiver, therefore, desires in any case to attend a taxation he cannot obtain leave from the taxing officer, but must apply to the registrar or the judge, as the case may be. Now, having expressed this view, I come back to what I said at first. My difficulty is that, although we are invited by all parties here to deal with this as a decision by the judge of the county court upon the point that

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was raised before him, I am not quite sure what he meant to decide. If the learned county court judge meant to decide that the official receiver had a right to be present and to be heard, all I can say is that I think he was wrong. If he meant to decide that he had a right to be present and to be heard irrespective of the discretion of the Court, I again think that he was wrong. But if what he meant to say was that, having regard to this particular bill and the circumstances of this case, he thought that in this case it was desirable that the official receiver should be present, not as a litigant, but as an officer both of the Court and of the Board of Trade, who might assist the taxing master by his advice or might advise the Board of Trade of what took place, or for the purpose of intimating to the trustee, as my learned brother points out to me, the items in respect of which he thinks there should be a reduction or a disallowance, then I think that the order was right. But it seems to me that under these circumstances the best thing to be done here is to send this matter back to the learned county court judge with an intimation of our view, and to ask him to make a specific order. If he merely thought that in this case the official receiver ought to be present at the taxation, then I think it is within his province so to order, and that no exception can be taken to that. But if he means anything else, then I think the matter is beyond his jurisdiction.

I have one other observation, and only one other, to make, and that is about the provisions to which our attention has been called in rules made under the Companies (Winding-up) Act, 1890. It will be seen that the clauses in those rules, running from 23 down to 27, are very similar to the clauses in the Bankruptcy Rules, and in fact in many cases the words are identical. Rule 25 in the Companies Rules is verbatim the same as rule 122, excepting that in addition these words are added, "and may attend or be represented on the taxation." I thought myself at first that the object of the addition of those words was merely to make clear the meaning of a rule which had been found to be somewhat ambiguous—that they were declaratory words only; but on further consideration I think that that was not a right inference. I do not think that any inference could be drawn from the expression in one set of rules

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and the omission in the other, based on the doctrine "Expressio unius est exclusio alterius," because the two sets of rules were not issued simultaneously. But there is an inference that the persons who drafted both sets of rules deliberately abstained from altering rule 122 of the Bankruptcy Rules when they added these words to rule 25 of the Companies Rules; and I should not come to that conclusion unless I could find some reason why the official receiver should be allowed to attend in the one case and not in the other. The words in the Companies rule, "and may attend or be represented on the taxation," must mean that the official receiver may attend as a litigant and be heard. But I think there is a very good reason for it. It is true that an official receiver, whether in bankruptcy or in the winding-up of companies, is appointed under the same section of the same Act of Parliament (46 & 47 Vict. c. 52, s. 66); but his duties in the two capacities are very different. The relation of an official receiver to a trustee in bankruptcy is quite different from the relation of an official receiver to a liquidator under the Companies Acts; and, moreover, the position of a liquidator in relation to the estate in liquidation is quite different from that of a trustee in bankruptcy. Under those circumstances I think it is right to draw the inference that the intention of those who framed the rule was that the position of an official receiver under the Companies Acts in relation to his attendance at taxations should be different to the position of an official receiver in relation to taxations in bankruptcy matters.

The case will, therefore, be remitted to the county court judge in order that he may make a definite order on the basis which I have indicated.

KENNEDY J. concurred.

Case remitted.

Solicitors for appellants: *Chester, Mayhew, Broome & Griffithes, for Crofton, Craven & Worthington, Manchester.*

Solicitors for trustee: *Boote & Edgar, Manchester.*

Solicitor for official receiver: *Solicitor to the Board of Trade.*

A. P. P. K.

1895
Oct. 31.

NEWMAN & DALE *v.* LAMPORT & HOLT.

Ship—Charterparty—"Port Charges"—Light Dues.

In a charterparty providing for the payment of port charges, the expression "port charges" must be taken to mean all charges which a vessel has to pay before she gets her clearance from a port, and therefore to include whatever light dues she may be required to pay at such port.

ACTION tried without a jury before Mathew J. in the Commercial Court.

In January, 1895, a charterparty was entered into between the plaintiffs and the defendants by which the defendants chartered the plaintiffs' steamer *Apex* to proceed to certain ports in South America, and there to receive "a full and complete cargo of wheat $\frac{\text{and}}{\text{or}}$ maize in bags $\frac{\text{and}}{\text{or}}$ other lawful merchandise $\frac{\text{and}}{\text{or}}$ cattle on deck at shipper's risk . . . and being so loaded the steamer shall therewith proceed to S. Vincent for orders to discharge in one safe port of the United Kingdom or on the Continent between Bordeaux and Hamburg both included."

The charterparty contained, inter alia, the following provisions: "In case of other lawful merchandise or cattle being shipped, the total freight to be paid to the steamer is to be the amount she would have earned had she been loaded entirely with wheat or maize." "The charterers to have the option of shipping cattle on deck for Deptford or to destination. If discharged at Deptford, charterers to pay port charges. Any extra freight so earned to be for the charterers' benefit."

The *Apex* accordingly proceeded to a South American port, and was loaded with cargo for Leith, and a deck cargo of cattle was shipped to be discharged at Deptford. She came into the port of London, and discharged the cargo of cattle at Deptford. As a consequence of coming into the port of London, the *Apex* incurred certain charges, some purely local, as Thames Conservancy dues, some matters of simple contract such as tug hire. These were paid by the charterers and were not in dispute. The sum of 43*l.* 9*s.* 1*d.* was also paid by the

charterers to the collector for the Trinity House. This sum was calculated according to published tables, and was made up of all the dues payable in respect of lights passed or used from entering British waters until arrival at Leith. Where a vessel enters a British port bound onwards to one or more further British ports, the practice is to collect at that port, being the British port first entered, the dues payable in respect of all lights passed or to be passed until arrival at the ultimate British destination, and until these dues are paid the vessel cannot clear outwards again. Had the *Apex* gone direct to Leith 37*l.* 6*s.* 9*d.* would have been payable there for light dues in respect of lights passed or used during the voyage, and would have been paid by the shipowners.

The owners of the *Apex* having brought this action in respect of balance of freight due to them under the charterparty, the charterers claimed the sum of 37*l.* 6*s.* 9*d.*, as money paid by them on behalf of the shipowners, and paid into court the sum of 6*l.* 2*s.* 4*d.*, the excess of 43*l.* 9*s.* 1*d.* over 37*l.* 6*s.* 9*d.*

Light dues are chargeable by the Corporation of Trinity House under the authority of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 643 et seq., and certain Orders in Council. They are payable in respect of all lights which a vessel passes on her voyage, and she may be detained at the port where light dues are payable, until the receipt for light dues is produced. General light dues are carried to the Mercantile Marine Fund, which is applied to a number of purposes connected with the mercantile marine, and is not solely devoted to keeping up lights.

H. F. Boyd, for the plaintiffs. The words of the charterparty are express. The only possible question is whether the light dues are "port charges." The expression "port charges" must mean all those charges which must be paid at any port before the vessel can get her clearance, and therefore must include light dues. The defendants are experienced in shipping matters, and knew when they entered into the charterparty that if the vessel touched at Deptford the light dues in respect of the whole voyage to Leith would have to be paid before she

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could leave. The charterparty expressly gives the extra freight to the charterer in consideration of his paying the port charges.

J. A. Hamilton, for the defendants. The expression "port charges" cannot in any case be construed to cover light dues. The utmost that the defendants could have to pay for light dues under this clause would be the extra light dues incurred in consequence of their exercise of their option to go to Deptford, and this sum they have paid into court. The collection of light dues which was made prospectively for her whole voyage was for national or imperial objects, and was not a port charge for the benefit of the port. "Port charges" only mean those charges which have to be paid to the authorities of the port as such, and do not include general light dues.

MATHEW J. In this case my judgment must be for the plaintiffs, and I hold that under the terms of this charterparty there was an obligation on the charterers to pay the charges in question. The charterparty was entered into in January, 1895, and it provided that the steamer should proceed to some South American port and there load a cargo to be discharged at a safe port in the United Kingdom or on the Continent: "In case of other lawful merchandise or cattle being shipped the total freight to be paid to the steamer is to be the amount she would have earned had she been loaded entirely with wheat or maize. . . . The charterers to have the option of shipping cattle on deck for Deptford or to destination. If discharged at Deptford, charterers to pay port charges. Any extra freight so earned to be for the charterers' benefit." It appears to have been contemplated that the charterers might take a cargo of cattle on deck, and if they discharged that cargo at Deptford they were to pay the port charges. As both the parties well knew, when once the vessel had touched at Deptford she would not be allowed to leave until she had paid the light dues, not only in respect of her voyage up the Thames to Deptford, but also in respect of her voyage from Deptford to Leith. All these light dues would have to be paid before she could obtain her discharge from the port. The question which I have to decide is, are those light dues "port charges" within the meaning of the

clause under consideration? There is no suggestion that the expression "port charges" has any special or customary meaning. The ordinary meaning of the phrase seems to me to be those charges which a vessel must pay before she leaves a port. But it is contended, that if this vessel had gone direct to Leith without calling at Deptford, these light dues would have been paid as a matter of course by the owners, and not by the charterers. Mr. Hamilton suggests that the utmost construction that ought to be put on the clause "charterers to pay port charges" is, that they should pay the extra charges caused by their taking the vessel up the river to Deptford and down again; and that amount they have paid into court. But can I say that these gentlemen, who were experienced in shipping matters, did not know what they were about, when they inserted this clause in the charterparty? It appears to me that there is nothing unreasonable in holding that the words should have their ordinary and natural meaning, namely, that if the charterers chose to take the vessel to Deptford they must pay all the charges which would have to be paid by the vessel before she could leave that port. No doubt if she had gone straight to Leith these light dues would have been paid by the owners; but the charterers are allowed to deviate to Deptford on the condition that if they do so they must pay the port charges—that is to say, charges which otherwise would have been borne by the owners. The clause was deliberately inserted in the charterparty by materially altering the printed form, and it provided that any extra freight so earned was to be for the charterers' benefit. If it had been intended that only the extra charges incurred by the voyage to Deptford should be borne by the charterers it would have been quite easy to say so. But the charterparty says nothing of the kind; and it seems to me that the words must be given their ordinary and natural meaning. I give judgment, therefore, for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *W. A. Crump & Son.*

Solicitors for defendants: *Stokes & Stokes, for Thornely & Cameron, Liverpool.*

A. P. P. K.

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Nov. 18.

[IN THE COURT OF APPEAL.]

In re Arbitration between THE MAYOR, ALDERMEN, AND BURGESSES OF BURSLEM and Others and THE COUNTY COUNCIL OF STAFFORDSHIRE.

Highway—Main road—Footways, Repair of in Urban Districts—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 13—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.

A county council is liable under the Local Government Act, 1888, s. 11, sub-s. 2, to contribute towards the costs of maintaining and repairing in an urban district the paved footways upon or at the sides of disturnpiked roads which have become main roads under the Highways and Locomotives (Amendment) Act, 1878, s. 13.

Appeal from the order of a Divisional Court (Grantham and Wright JJ.) refusing to set aside an award made by the Local Government Board under the Local Government Act, 1888, s. 11, sub-s. 3.

The facts so far as material were as follows. The authorities of certain urban districts in Staffordshire, namely, the corporations of Burslem, Longton, and Wednesbury, the local boards of Audley, Rowley Regis, and Tettenhall, and the Leek Improvement Commissioners, had claimed under the Local Government Act, 1888, s. 11, sub-s. 2, to retain the powers and duties of repairing main roads within their respective districts; and thereupon questions arose between the county council and these authorities respectively as to the amounts of the annual contributions to be made by the county council under the sub-section towards the costs of the maintenance and repair of these roads within the respective districts. The matter was referred to the arbitration of the Local Government Board under the Local Government Act, 1888, s. 11, sub-s. 3; and the Board made an award determining the amount of the annual contribution to be made by the county council towards these costs in the case of each district. Certain of the main roads which passed through the districts of the above-mentioned urban authorities respectively had been turnpike roads, and had

become main roads upon ceasing to be turnpike roads under s. 13 of the Highways and Locomotives (Amendment) Act, 1888. Application was made by the county council to set aside the award of the Local Government Board on the ground that they had exceeded their jurisdiction by including in the amounts awarded contributions towards the costs of maintaining and repairing the paved footpaths by the side of the above-mentioned roads where they passed through the various urban districts. The Divisional Court dismissed the application on the authority of the decision in *In re Local Board of Warminster and Council of the County of Wilts.* (1)

Oct. 28. *A. T. Lawrence* (*Littler, Q.C.*, with him), for the county council. The Local Government Board had no jurisdiction as arbitrators to make the county council contribute to the cost of maintaining and repairing the paved footways by the side of these disturnpiked roads, which have become main roads, where they pass through an urban district. These footways do not form part of the "main road." The object of s. 13 of the Highways and Locomotives (Amendment) Act, 1878, by which disturnpiked roads became "main roads," was to provide for the maintenance and repair of turnpike roads on the cessation of the turnpike trusts. The term "road" in that section, therefore, ought to be read as including only that portion of the highway which was repaired by the turnpike trustees. By the General Turnpike Act (3 Geo. 4, c. 126), s. 111, turnpike trustees might make and keep in repair footways by the side of turnpike roads; but by s. 112 it was provided that nothing in the Act should authorize them to make or maintain any pavement or any paved or pitched causeway or footpath in, upon, or at the side of any turnpike road within any town, village, or hamlet, where such turnpike road passed through the same, but that such footpaths should be made and maintained by the inhabitants of such town, village, or hamlet, or other persons liable to make and repair the same. The reason for this legislation obviously was that it was thought that these paved footpaths, being costly and being really made,

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not for the through traffic, but for the benefit of the inhabitants of the town, ought to be made and repaired by them. Accordingly, while the turnpike trusts existed, the liability to repair these paved footpaths fell upon the urban authorities under the Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 144; and it could not have been intended by the Legislature to relieve them from liability and cast it on the county at large. The paved footpath in an urban district is no part really of the road for this purpose. The term "road" in the Turnpike Acts is generally used as meaning the carriage road. It is the road which, when disturnpiked, becomes the main road under the Highways and Locomotives (Amendment) Act, 1878. It may be that the footway and roadway together form one highway, and that outside an urban district both may be included in the "main road," because the turnpike trustees repaired both; but it is contended that, nevertheless, within the urban district the footway is not part of the "main road" because it was not part of the road which was maintained by the turnpike trustees. The case of *In re Local Board of Warminster and Council of the County of Wilts* (1) was wrongly decided, and should be overruled.

Lawson Walton, Q.C., and *A. Macmorran*, for the urban authorities. The contention for the county council involves the notion that there are two sorts of "main roads," in relation to which respectively the term "main road" must receive a different meaning according to the previous history of the road, one being the main road under s. 13 of the Highways and Locomotives (Amendment) Act, 1878, which was formerly a turnpike road, and the other being the ordinary highway declared to be a main road under s. 15 of that Act. That would be most inconvenient, and never can have been the intention of the Legislature. With regard to ordinary highways declared main roads under s. 15, the footways would clearly be included in the "main road." The Highways and Locomotives (Amendment) Act, 1878, created a new class of roads—namely, "main roads." The object was not merely to provide for the case of disturnpiked roads, but to relieve the particular

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localities from a portion of the expense of repairing highways which were used largely for through traffic; and the "main road" for this purpose means the whole highway, however it came into existence—that is, the whole space between the fences, both carriage road and footpath. In cases within s. 112 of the General Turnpike Act, the footways, if in or upon the turnpike highway, would be part of it, and therefore would clearly be included in the main road. It never can have been intended that an historical inquiry should be gone into as to whether the footpath by the side of the carriage-road had originally formed part of the turnpike road or not. The existence of turnpike trusts did not relieve the inhabitants of the locality from liability. They were liable for the repair of the highway, including footpaths as well as carriage road, if the trustees failed to repair it. It was to relieve them in respect of that liability that the provisions of the Highways and Locomotives (Amendment) Act, 1878, and the Local Government Act, 1888, with regard to main roads, were passed.

A. T. Lawrence, in reply.

Cur. adv. vult.

Nov. 18. Lord Esher M.R. It is admitted that the point in dispute in this appeal is the same as that which was raised in the case of *In re Local Board of Warminster and Council of the County of Wilts* (1); so that the question really is whether we agree with the judgment given in that case or not. The point is whether the paved footways upon or at the side of certain main roads, where they pass through towns, are included in the term "main road" for the purposes of s. 11 of the Local Government Act, 1888. That section provides in sub-s. 1 that every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878, shall, after the appointed day, be wholly maintained and repaired by the council of the county in which the road is situate. Then by sub-s. 2 it is provided that any urban authority may claim to retain the powers and duties of maintaining and repairing a main road within their district, and

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thereupon they shall be entitled to retain the same; and in that case the council are to make to such authority an annual payment towards the costs of the maintenance and repair of the road. What the county council have to contribute to, therefore, is the maintenance and repair of a "main road"; and, to ascertain what a main road is, we have to refer back to the Highways and Locomotives (Amendment) Act, 1878. What, then, is meant by the term "main road" under that Act? The term "main road," where applicable under that Act, seems to me to have much the same meaning as the more familiar term "high road." All high roads are highways; but all highways could not be called high roads. There are green roads and cross roads which no one would call high roads. The term "high road" is applied to a made road which leads from one place of importance to another; for example, we speak of the high road from London to York, or from London to Exeter; and that seems to be the kind of road which is intended to become a main road under the Act. Such a road may in some cases have been previously a turnpike road. But provision was made by which other roads, some of which up to a certain time may not have been what would ordinarily be spoken of as high roads, may be declared "main roads" by the county authority. The reason for that provision obviously was that a place which was a small place may grow into a large town, and then a road leading from it to another large place may become a main road; or a road leading to a railway station, which was not previously to the existence of the station what would be called a high road, may become a main road. I think the words of the Act ought to be construed in the sense in which they would be understood by ordinary people in relation to the subject-matter. What, according to the ordinary use of language, would be meant by the "road" or "high road" from one place to another? The term would not necessarily include all the ground that lies between the fences on either side of the road; but in its ordinary meaning it appears to me to include all that portion of ground, whether carriage-way or footway, which has been in fact dedicated and accepted by the public as the road. I think that was what the Legislature intended when they used the terms

"road" and "main road" in these enactments. The question whether the footpath is part of the main road or not cannot, I think, depend on the materials of which it is constructed. Where such a road passes through towns, there is frequently a paved footpath. This does not exist solely for the benefit of the inhabitants of the town, as was suggested. It is for the benefit of the general public, of persons who may have occasion to pass through the town on their way elsewhere, as well as of the inhabitants or persons who have occasion to resort to the town. Where there is a "high" or "main" road with a footpath, which passes through an urban district, it can hardly be disputed that it is all one road or highway before it passes into the urban district. That being so, it seems to me impossible to say that, when it enters the urban district, it becomes two highways, one a footway for passengers on foot, the other a carriage-way for carriages and carts. It is obviously not so. The foot-passengers are entitled to go upon the carriage-way. The whole forms one highway or high road, though for convenience and safety part of the road is generally used for one sort of traffic and the other part for the other. It seems to me that, according to the ordinary use of language, in such cases the footpath and the carriage-way, within as well as without the urban district, are not separate roads or ways, but both together form the one "high" or "main" road. That being so, it appears to me that the paved footway within an urban district is included in the term "main road" for the purposes of s. 11 of the Local Government Act, and the county council is bound to contribute to its maintenance under sub-s. 2 of that section, as well as to that of the carriage-way. I agree with the judgment of the Queen's Bench Division in the case of *In re Local Board of Warminster and Council of the County of Wilts*. (1) For these reasons I think the appeal must be dismissed.

KAY L.J. read the following judgment:—The county council of Staffordshire object to contribute to the repair and maintenance of various paved footways within certain urban districts

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in that county. Their liability to contribute depends upon s. 11 of the Local Government Act, 1888, which enacts that "every road in a county which is for the time being a main road within the meaning of the Highways and Locomotives (Amendment) Act, 1878," shall "be wholly maintained and repaired" by the county council, provided that any urban authority may claim to maintain such road within their district; and in that case the county council are to contribute an annual sum towards the costs of the maintenance and repair of such road. The amount of such payment may be fixed by agreement or by arbitration of the Local Government Board. Such an arbitration has taken place in this case, and it is sought to set aside the award because it has directed contribution to the maintenance of paved footways in several urban districts at the side of the carriage-ways. Whether or not this was right depends upon the meaning of the word "road" or "main road" in the section to which I have referred. The Act of 1888 does not contain any definition of "road" or "main road," but refers, as I have pointed out, for the meaning of "main road" to the Highways and Locomotives (Amendment) Act, 1878. Sect. 13 of this statute provides that any road which between December 31, 1870, and the passing of that Act ceased to be a turnpike road, and any road which at the time of the passing of the Act was a turnpike road, but might afterwards cease to be such, should be deemed to be a main road; and by s. 15 the county authority, at the instance of the highway authority, might declare certain roads which had never been turnpike roads to be main roads.

From the papers in this case which have been handed to me it does not appear whether all the roads in question were originally turnpike roads or not. If there be any which were never turnpike roads, but have become main roads, I do not understand how it can be argued with respect to these that a pathway by the side of the carriage-way is not part of the road. "Road" must primâ facie mean the highway, and the pathway is undoubtedly part of the highway which is a main road.

But the argument for the county council is rested upon the assumption that all or some of these roads were formerly turn-

pike roads, and is derived from the history of the legislation as to turnpike roads. The statute of 3 Geo. 4, c. 126, intituled an Act to amend the general laws now in being for regulating turnpike roads in England, contains a power (s. 111) for turnpike trustees to make and keep in repair causeways for the use of foot-passengers "in, upon, or on the sides of the turnpike road in such manner as they shall think proper." But this is restricted as to any town, village, or hamlet by s. 112, which provides that nothing in the Act contained shall authorize the turnpike trustees "to lay down, continue, repair, or maintain any pavement or any paved or pitched causeway or footpath in or upon or at the side of any turnpike road within any town, village, or hamlet where such turnpike road shall pass through the same," but such pavement, paved or pitched causeway, or footpath is to be made, repaired, and maintained by and at the costs of the inhabitants of such town, village, or hamlet, or by other persons liable to make, maintain, and repair the same. This legislation was obviously intended to define the rights and obligations of turnpike trustees as between them and the inhabitants of a town, village, or hamlet. It has nothing to do with the rights or obligations of the county council as to main roads. As between them and the inhabitants of a town, village, or hamlet, there is no such restriction, nor does there seem to be any reason for it. After turnpikes were abolished and before the Act of 1888, the highway authority in an urban district maintained both carriage-way and footways adjoining. Then, by the Act of 1888, the duty is cast upon the county to maintain main roads, and there is nothing to restrict the meaning of these words to the carriage-way, excluding the footpath at or on the side of it. If the urban authority does not claim to maintain such roads, the county must do so. If the urban authority makes such a claim, the county must contribute; and in either case the main road is primâ facie the whole highway, including the footway as well as the carriage-way. Any other construction is not warranted by the words of the Act, and would involve this most inconvenient result, that there must in every case be an inquiry—(1.) was the main road once a turnpike road, and (2.) was the footway upon the turnpike road or

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outside it? The point has been decided against the county council in the case of *In re Local Board of Warminster and Council of the County of Wilts* (1), and I agree with that decision. The appeal should be dismissed, with costs.

RIGBY L.J. read the following judgment:—Speaking generally, I concur in the reasons given by the learned judges in the case of *In re Local Board of Warminster and Council of the County of Wilts* (1); but with reference to the arguments most pressed upon us by counsel for the appellants, I think it right to give my own reasons.

The ground upon which the award in this case is sought to be set aside is that the Local Government Board have exceeded their jurisdiction by including in the expense thrown upon the county council the costs of paved footways by the side of the carriage-way within the borough of Burslem. A similar question, we are told, arises with reference to the cost of paved footways within other boroughs in the county, and no distinction has been suggested between the cases of the different boroughs.

Sub-s. 1 of s. 11 of the Act of 1888 throws upon the county council the maintenance and repair of every road in the county which is *for the time being* a main road within the meaning of the Act of 1878. Sub-s. 2 enables any urban authority to claim to retain the powers and duties of maintaining and repairing a main road within their district; and thereupon they are to be entitled to retain the same, and, for the purpose of the maintenance, repair, improvement, and enlargement of and other dealing with the road, they are to have the same powers and be subject to the same duties as if the road were an ordinary road; and the county council are to make to them an annual payment towards the costs of the maintenance and repair and reasonable improvement connected with the maintenance and repair of the road.

The roads in question are roads which were formerly turnpike roads running as to part thereof through the borough, and they have been disturnpiked. It is not suggested that s. 13 of the Act of 1878 does not apply to them. The contention, however,

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is that in the borough only the carriage roads and not the footpaths are made main roads; and in support of this contention reference is made to ss. 111 and 112 of the General Turnpike Act, 3 Geo. 4, c. 126. Sect. 111 of that Act makes it lawful for the turnpike trustees to make and keep in repair any causeway or causeways for the use of foot-passengers in, upon, or on the sides of the turnpike road in such manner as they shall think proper. Any causeways made under this power would be part of the turnpike road. Sect. 112, however, operates as a proviso upon the other parts of the Act, including s. 111, and enacts that nothing in the Act contained as to the making or maintaining any causeway or footpath, or any other matter or provision in the Act, shall extend to authorize or empower any turnpike trustees to lay down, continue, repair, or maintain any pavement, or any paved or pitched causeway or footpath in, upon, or at the side of any turnpike road within any town, village, or hamlet, where such turnpike road shall pass through the same, unless provision shall have been specially made for the same in the Act or Acts of Parliament under which such turnpike road shall be made, maintained, or repaired; and in default of such provision every such pavement, paved or pitched causeway or footpath within such town, village, or hamlet shall be made, repaired, and maintained by and at the costs of the inhabitants or other persons liable. In this case there is no special Act containing provisions on the subject. It was argued, and may well for the present purpose be assumed, that by "road" in some parts of the Turnpike Acts carriage road alone is meant. It is, however, in my judgment impossible that the meaning can be so limited in the section referred to.

Outside the towns the causeways must be part of the turnpike road. Within towns it is clear that they may be, though perhaps not necessary that they should always be. Take the common case of an existing road with footpaths becoming subject to a turnpike trust within towns. The trustees may not continue these footpaths; but they remain nevertheless part of the turnpike road. So, if footpaths are made in or upon the turnpike road as contemplated by s. 112, the portion of the road on which they are made is not taken out of the

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turnpike road, but still remains part of it. If a town extends its boundaries so as to include within them part of a turnpike road with footpaths, s. 112 would apply; but the whole of the road including the footpaths would be a turnpike road though passing through a town. If this be so, I cannot avoid the conclusion that the county council are liable for the expense of paved footpaths properly forming part of the main road. They certainly would be liable in the case of footpaths existing when the road was made a turnpike road, and of all footpaths made by the turnpike trustees under s. 111 of the General Act, and of all made under s. 112 in or upon the road before it was disturnpiked. The Act of 1878 is a general one, and must receive a general interpretation. It cannot have been intended that an inquiry should be necessary into the history of every portion of the road, since there might be a different origin of the footpaths for every ten yards of road, and as in the case of an ordinary road or a road made a main road under s. 15, new footpaths may from time to time be properly made by the urban authority. Further, to ascertain the precise facts would in many cases be impossible.

In my opinion the Act of 1888, when it speaks of the main road for the time being and speaks of the improvement and enlargement of the road, sufficiently indicates that the liability of the council is to extend to all footpaths which for the time being are properly parts of the main road for the time being; and there is nothing here to shew that the paved footpaths, the costs of which the county council object to pay, are not, or indeed have not been from the first creation of the turnpike trust, part of the turnpike road which is now a main road.

In my judgment the appeal fails.

Appeal dismissed.

Solicitors for county council: *Byrne & Blakiston, for Hand & Co., Stafford.*

Solicitors for urban authorities: *Sharpe, Parker & Co., for A. Ellis, Burslem; G. C. Kent, Longton; G. Rose, Wednesbury; J. J. Nelson, Audley; T. Cooksey, Rowley Regis; Hacker & Allen, Leek.*

E. L.

[IN THE COURT OF APPEAL.]

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Nov. 25.

THE BRITISH WAGON COMPANY, LIMITED *v.* GRAY.

Practice—Service of Writ out of Jurisdiction—Defendant domiciled or ordinarily resident in Scotland—Agreement that Writ may be served out of Jurisdiction—Order XI., *r.* 1 (*e*).

An agreement by a person domiciled or ordinarily resident in Scotland that a writ for breach of contract arising within the jurisdiction may be served on him in Scotland does not authorize the Court to direct service of such a writ in Scotland, as to do so would be in direct contravention of Order XI., r. 1 (*e*).

APPLICATION by the plaintiffs ex parte on appeal from an order of Mathew J. at chambers refusing leave to serve the writ in Scotland.

The plaintiffs were a company having their registered office at Rotherham, in Yorkshire, and under an agreement in writing, in which the defendant was called "the tenant," they let some coal wagons to the defendant, who was resident in Scotland. The agreement contained the following clause: "This agreement shall in all respects be construed and carried into effect according to the law of England, and for the purposes thereof the tenant hereby submits to the jurisdiction of the High Court of Justice in England." The rent due from the defendant for the hire of the wagons being in arrear, this action to recover it was commenced, and application was made to the judge at chambers for leave to serve the writ in Scotland. Leave was refused, and this application was made to the Court of Appeal.

T. Willes Chitty, for the plaintiffs. This case comes within Order XI., r. 1 (*e*) (1), for the defendant ought to pay the rent

(1) By Order XI., r. 1 (*e*), service out of the jurisdiction of a writ of summons may be allowed where "The action is founded on any breach or alleged breach, within the jurisdiction, of any contract wherever made, which according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

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at Rotherham as no place of payment is named, and therefore there is a breach within the jurisdiction. The latter part of the rule does not apply, for the defendant has contracted to submit to the jurisdiction of the English Courts, and he therefore submits to be served in Scotland as the means of bringing him before the Court. [He cited *The M. Moxham* (1) and *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux.* (2)]

LORD ESHER M.R. In this case application was made to a judge at chambers to allow service of the writ in Scotland on the defendant, who is domiciled and resident there. It is obvious that the case comes within the exact terms of Order XI., r. 1 (*e*). The action is founded on an alleged breach within the jurisdiction of a contract which, according to the terms thereof, ought to be performed within the jurisdiction, and the defendant is ordinarily resident in Scotland. The rule would permit the Court to make the order but for the last clause, which expressly excepts such a case as this. The question whether such an order can be made is a question of jurisdiction, and therefore, by the very terms of the rule, the Court has no jurisdiction in such a case as this. Then it is said that the defendant has contracted that the Court may order service of the writ upon him in Scotland. It is not alleged on behalf of the plaintiffs that they can themselves serve the writ in Scotland; but it is said that the Court may order that this shall be done. It seems to me that there are two answers to this contention. One is that the contract does not bear the construction put upon it; but I do not proceed on that, but on the ground taken by the learned judge, that even if the contract were so construed the Court can take no notice of such an agreement, and can only order service of the writ in the manner allowed by the rules, and not in any other manner upon which the parties may agree. Two cases were cited in support of the proposition that the parties could by contract give the Court jurisdiction which the rules did not give. The

(1) 1 P. D. 107. (2) 60 L. T. (N.S.) 924.

cases do not support this proposition. In *The M. Moxham* (1) both parties were before the Court, and the only question was by what law the case was to be determined. In *Tharsis Sulphur Co.* v. *Société Industrielle des Métaux* (2) all that was decided was that a person without the jurisdiction may appoint a person in this country to accept service, and that acceptance by a person so appointed is a proper acceptance. That is not a question of the jurisdiction of the Court to make an order as to service. The Court is forbidden to exercise the jurisdiction which it is now asked to exercise, and cannot regard the contract of the parties as to the extent of its jurisdiction. The application must, therefore, be dismissed.

LOPES L.J. I am of the same opinion. Assuming the contract had the effect which it is contended that it had, I think it is clear that the parties had no power to contract that the Court should have a jurisdiction which is forbidden by the rules.

KAY L.J. The plaintiffs seek to serve a writ out of the jurisdiction in Scotland, and propose that the Court should make an order to enable them to do so. On looking at the rules, it is found that such a case as the present is expressly excluded. Apart from the rules, there would be no power to serve the writ on a person out of the jurisdiction; and the rules, while providing for such service in some cases, provide that it shall not be made on a person in the position of the defendant. So far the matter is beyond argument; but then it is said that by the terms of a contract made between the parties the defendant has submitted to the jurisdiction of the English Courts. It is contended that from this it must necessarily be implied that he submits to be served in Scotland. I do not think that is a right implication; but if it were, such an agreement could not give the Court power to make an order which the rules say shall not be made. Such a contract would be ultra vires, and of no effect. I think, therefore, that the learned judge was

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right in refusing to make the order, and that the application must be dismissed.

Application dismissed.

Solicitors for plaintiffs: *Bell, Brodrick & Gray, for Harrop & Harrop, Rotherham.*

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[IN THE COURT OF APPEAL.]

COLONIAL SECURITIES TRUST COMPANY, LIMITED *v.* MASSEY AND OTHERS.

Practice—Trial without Jury—Rehearing in Court of Appeal—Decision of Judge on Facts—Weight to be given to Decision.

Where a case tried by a judge without a jury comes before the Court of Appeal, that Court will presume that the decision of the judge on the facts was right, and will not disturb it unless the appellant satisfactorily makes out that it was wrong (*per* Lord Esher M.R. and Lopes L.J.).

Per Kay L.J.: Under Order LVIII. the Court of Appeal is bound to try the case and give the judgment which ought to have been given, though in a doubtful case the judgment of the Court below on the facts is entitled to great weight.

APPEAL from a judgment of Day J. at the trial of the cause without a jury.

At the trial there was a conflict of evidence, and the learned judge gave judgment for the plaintiffs. The cause of action and the facts of the case are not material to this report, which deals only with the rules laid down by the Court of Appeal in relation to cases that come before that Court on appeal from the judgment of a judge trying a case without a jury.

Cripps, Q.C. (*Edward Pollock*, and *Rose Innes*, with him), for the defendants (the appellants).

Bompas, Q.C., and *T. Willes Chitty*, contra.

LORD ESHER M.R. I am of opinion that this appeal should be dismissed. We must see first of all what is the rule of conduct of the Court of Appeal when hearing an appeal on a question of fact from the judgment of a judge trying a case without a jury. It cannot be shaped according to the rule of

conduct of the Courts of Common Law before the Judicature Acts, but must follow that adopted by the Courts of Appeal in Chancery, because before that Court only could an appeal from a judge sitting without a jury have then come. In the Courts of Equity the matter appealed against was the decision of a judge, and for that reason such an appeal was called a rehearing, since the Court could set aside the decree or judgment of the judge who had tried the case, and pronounce another decree or judgment. (1) The Court of Appeal in Chancery acted upon this rule, that they would not allow an appeal unless they were satisfied that the judge was wrong. If they were in doubt at the end of the argument whether the judge was right or wrong, since the burden of proof was on the appellant and he had not satisfied them that the judge was wrong, they dismissed the appeal. That is the rule of conduct which we ought now to apply in this Court. The judge in the Court below may have heard witnesses; and if so the Court of Appeal would be more unwilling to set aside his judgment, especially if there was a conflict of evidence, than in a case tried on written evidence where the witnesses were not before the judge, because of the opportunity afforded of judging how far the witnesses were worthy of credit. Where witnesses are not examined before the judge, but the case is determined on evidence taken on affidavit, or examination not before the judge, or partly on one and partly on the other, the Court of Appeal is not hampered by the consideration that the judge in the Court below has seen the witnesses, whilst the Court of Appeal has not, and the rule of conduct would not apply so strongly, but still this Court would not reverse the judgment and give a different one, unless satisfied that the judge was wrong. I have frequently stated this rule; and I think it is well expressed by Lopes L.J. in *Savage* v. *Adam*. (2) The matter is thus stated: "Where a case tried by a judge without a jury comes to the Court of Appeal,

(1) In strictness the Master of the Rolls, or later a Vice-Chancellor, was only the Chancellor's delegate, and so the matter was open to rehearing before the decree was enrolled. After enrolment the only appeal was to the House of Lords.—F. P.

(2) W. N. (95) 109 (11). And see *The Glannibanta*, 1 P. D. at p. 287; *Bigsby* v. *Dickinson*, 4 Ch. D. 24.—F. P.

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the presumption is that the decision of the Court below on the facts was right, and that presumption must be displaced by the appellant. If he satisfactorily makes out that the judge below was wrong, then inasmuch as the appeal is in the nature of a rehearing, the decision should be reversed: if the case is left in doubt, it is clearly the duty of the Court of Appeal not to disturb the decision of the Court below." With the rule so stated I entirely agree. [His Lordship then dealt with the facts of the case.]

LOPES L.J. I agree that this appeal should be dismissed for the reasons already given. As the Master of the Rolls has approved of what I said in *Savage* v. *Adam* (1), I need not repeat the view I then expressed.

KAY L.J. This is an appeal from the judgment of Day J., who tried the case without a jury. Some of the witnesses were examined in court; but the case did not depend upon their evidence, but upon the evidence of witnesses taken upon commission. Order LVIII. shews without doubt that such an appeal as the present is a rehearing of the case; and, so far as the evidence taken on commission is concerned, this Court has the same means of judging of its value as the judge had in the Court below. We must therefore try the case, and see whether we differ from the learned judge; and if we do we must give the judgment which we think he ought to have given. I quite agree that if the case is one of doubt and difficulty, and if, upon consideration of the whole of the evidence, the Court cannot come to the conclusion that the judge was wrong, very considerable weight should be given to the view taken by the judge in the Court below. Beyond that I do not think the Court ought to go, as it is bound to try the case, and give the judgment which should have been given in the first instance. If I had had to try this case, I should have said that the plaintiffs had not satisfied the burden of proof which was on them, and had failed to make out their case. The learned judge took a different view, and the other members of the Court are of the

(1) W. N. (95) 109 (11).

opinion of the learned judge; but though I attach much importance to the opinion of the judge who tried the case, and to the views of my learned colleagues, I think I am bound to state, and abide by, the opinion I have formed, which is that the appeal ought to be allowed.

Appeal dismissed.

Solicitors for plaintiffs: *Bompas, Bischoff & Co.*
Solicitors for defendants: *Ingle, Cooper & Holmes.*

A. M.

[IN THE COURT OF APPEAL.]

WATSON (SURVEYOR OF TAXES), APPELLANT; THE ROYAL INSURANCE COMPANY, LIMITED, RESPONDENTS.

Revenue—Income Tax—Assessment of Profits or Gains—Payment made to Retiring Manager of Company—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Cases* 1 *and* 2, *r.* 1.

The respondents, an insurance company, on taking over the business of another insurance company, agreed to take the manager of that company into their service at a specified salary, with liberty to commute the same by payment of a gross sum, to be ascertained in a manner agreed on. The respondents subsequently dismissed the manager, and paid him a sum of money ascertained in accordance with the agreement. In making up their return of profits for assessment to income tax for the year in which the payment was made, the respondents deducted the sum so paid. On a case stated by Commissioners of Income Tax:—

Held, that the money so paid was not money expended for the purposes of the respondents' adventure within the meaning of the first rule applicable to the first two cases of Sched. D of s. 100 of the Income Tax Act, 1842, and could not be deducted.

APPEAL from a judgment of a Divisional Court on a case stated by Commissioners of Income Tax.

1. At a meeting of the commissioners for the general purposes of the Income Tax Acts for the Division of Liverpool, the Royal Insurance Company appealed against an assessment made upon them under Sched. D of the Act 16 & 17 Vict. c. 34, for the year ending April 5, 1893, and claimed an allowance by way of deduction in respect of a sum of 55,846*l.* paid under the circumstances following.

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2. By the Royal Insurance Companies Act, 1891 (54 & 55 Vict. c. lxxxi.), the Royal Insurance Company were invested with powers to acquire the whole of the undertaking of the Queen Insurance Company; and in pursuance of this Act the transfer of the business of the Queen Insurance Company to the Royal Insurance Company took place on August 19, 1891.

3. By art. 6 of the agreement between the two companies embodied in the schedule forming part of the Act, it is provided that "the services of the present manager of the Queen Insurance Company shall be retained by them until the transfer of the business is completed at a salary at the rate of four thousand pounds per annum and thereafter he shall be taken into the service of the Royal Insurance Company at the same rate with liberty nevertheless for the Royal Insurance Company to commute the same by payment to him of a gross sum on the basis of the Queen Insurance Company's annuity tables applicable to his then age on condition that he shall not at any time accept office or employment of any description under or in connection with any other fire or life insurance company."

4. On the transfer of the business the manager of the Queen Insurance Company was taken into the service of the Royal Insurance Company at the salary of 4000*l.* per annum; and shortly afterwards, in pursuance of the powers conferred on them by the 6th article of the agreement, and in accordance with its terms, the Royal Insurance Company paid him the sum of 55,846*l.* in commutation of his annual salary.

5. The Royal Insurance Company contended that, in arriving at the amount of their liability for assessment for the year ending April 5, 1893, under the provisions of the Income Tax Acts, the said sum of 55,846*l.* was a proper deduction to make from the profits of their business for the year 1891–2 (the year in which the commuted payment was made), and that if they had elected to continue the annual payment of 4000*l.* that amount would have been charged in their revenue account yearly, and so have reduced the profits assessable for taxation.

6. The appellant, on behalf of the Crown, contended that the sum of 55,846*l.* could not, from the very nature of the case, be considered an expense necessary to earn the profits of the year

against the revenue of which it was sought to be charged; that, being a payment at the option of the Royal Insurance Company, it was in reality part of the consideration paid for the business of the Queen Insurance Company, and was, therefore, properly a charge to capital as an expense of acquiring the undertaking, and not against revenue; that, under the agreement already quoted, the annual payment of 4000*l.* would have been for services rendered, and a legitimate charge against profits so long only as the payment lasted; but that the commutation of this annual payment involved the abandonment of all claim to services, and transformed the annual payment into a capital expense; and that, therefore, the deduction of 55,846*l.* from the profits of the year to December 31, 1891, was not admissible in arriving at the liability of the company for assessment under the provisions of the Income Tax Acts.

7. The commissioners were of opinion that the sum paid as aforesaid was a proper deduction from the profits chargeable to income tax, but at the request of the appellant stated this case.

The question for the opinion of the Court was whether for purposes of assessment to income tax the Royal Insurance Company were entitled to charge against their profits the sum so paid by them in the year 1891–2.

The Divisional Court directed that the case should be remitted to the commissioners for amendment in order to ascertain the circumstances under which, and the consideration in respect of which, the agreement to pay the sum of 55,846*l.* to the manager, as set out in the case, was arrived at.

The appellant appealed.

Sir R. B. Finlay, S.-G., and *Danckwerts*, for the appellant. To entitle the respondents to deduct any sum, they must shew that it was expended for the purposes of their business—that is, of earning the profits that are the subject of the tax. The sum paid to the manager cannot be so described, as it did not contribute to the earning of any profits.

Joseph Walton, Q.C., and *W. H. Horsfall* (*A. Hyslop Maxwell*, with them), for the respondents. The annual payment made to their manager could be deducted, and when such a payment is

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commuted for a lump sum that also should be deducted. The only way in which the respondents could acquire this business was by undertaking to pay this money; and therefore the payment of it may properly be said to be an expenditure on their business, not in the nature of a capital charge, but directly affecting their profits.

Sir R. B. Finlay, S.-G., in reply.

LORD ESHER M.R. We have in this case to construe a phrase in the Act of Parliament and to apply it to the facts stated. In order to construe the phrase, the first thing to ascertain is what the statute is dealing with. It is dealing with a tax to be paid on the profits earned in trade on an average of three years, and the amount to be taxed is to be ascertained according to the rules laid down in the Act, and not on the rules upon which a tradesman or a partnership would ascertain and set aside profits. The amount is to be ascertained by means of the earnings—that is, the gross earnings—on the one side and certain deductions on the other. These deductions are the disbursements named in the Act, and it is only those that can be deducted. Those allowed by the 1st rule of the 100th section, Sched. D, of the Income Tax Act, 1842, applicable to the two first cases in the section are disbursements "wholly and exclusively laid out or expended for the purposes of such trade." We have to put a construction on those words; and it seems to me that they mean disbursements and expenses which are laid out or expended for the purpose of earning the profit which is to be the subject-matter of the tax.

To apply that to this case, I doubt whether it can be said that this disbursement was a part of the purchase-money of the business of the Queen Insurance Company. What I should think was a part of the consideration given was the undertaking by the respondents to contract with the manager to pay him a salary whilst he served them, and a lump sum if they dismissed him. We must, however, consider the case as if the Queen Insurance Company had never existed, and the respondents had employed this manager on the terms that they would

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give him a salary for an indefinite time, perhaps for life, and pay him a lump sum if they dismissed him. While they were paying him the salary under such a contract they would be paying for his services; and as those services would go to earn the profits which would be the subject-matter of taxation, the amount paid him would be properly deducted. When they resolve to dismiss him, it cannot be said that anything paid afterwards is a disbursement for services rendered by him which go to earn the taxable profit. I think, on the true construction of the rule, money so paid cannot be brought into the computation of the profits, and that therefore this sum was not rightly deducted, and the appeal should be allowed.

LOPES L.J. I am of the same opinion. The question is whether the respondents are entitled to deduct a sum of 55,846*l.* in making up their accounts for assessment to Income Tax under Sched. D.

It is important to see upon what the duty is chargeable under Sched. D. It is chargeable upon the profits or gains of any trade, manufacture, adventure, or concern upon a fair and just average of three years ending on such day of the year immediately preceding the year of assessment on which the accounts of the trade shall have been usually made up. In arriving at the balance of profits or gains to be charged, the first rule applicable to the two first cases in s. 100, Sched. D, of the Income Tax Act, 1842, provides that "no sum shall be set against or deducted from or allowed to be set against or deducted from such profits or gains for any disbursements or expenses whatever, not being money wholly and exclusively laid out or expended for the purposes of such trade, manufacture, adventure, or concern, or of such profession, employment, or vocation." Therefore it is necessary that it should be shewn that this sum which is sought to be deducted was expended for the purposes of the adventure. I understand this to mean for purposes which contribute to the earning of the profits or gains, so that the expenses contemplated must be expenses properly incurred in producing the profit which is to become assessable. Applying that test to this case, it appears to me that this payment did not contribute to

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and was not in any way properly incurred in earning profits. It was paid for the purpose of dispensing with the services of the manager, and not with the purpose of earning profits.

I think this is a complete answer to the respondents' case, and sufficient ground for holding that the deduction cannot be made. Speaking for myself, I am inclined to think that it might be successfully contended that this money was part of the price or consideration for acquiring the business of the other insurance company. However, the former ground is the one upon which I place most reliance; and on that ground I think we must decide that the deduction cannot be made.

KAY L.J. The question is whether this sum of 55,846*l.* comes within any of the deductions allowed by the Income Tax Act, 1842. The Act, as was pointed out by Lindley L.J. in *Gresham Life Assurance Society* v. *Styles* (1), does not use the words "profits and gains" in Sched. D precisely in the way in which a tradesman or a company would use the words in estimating their profits and gains for any given year. It may well be that the company in making an estimate to see what they had got to divide in the year would deduct a sum like this. Examples of the difference in the use of the terms are given by Lord Herschell in the same case in the House of Lords. (2) The truth is that in this Act certain deductions are allowed; and then, by s. 159, it is provided that no other deductions are to be made. In order, therefore, to justify this deduction, it must be brought within rule 1 of the rules applicable to the first two cases in s. 100. It must be asked, then, whether this money was wholly or exclusively laid out or expended for the purposes of this business. The money was expended in order to enable the company to dispense with the services of the manager. Whether they thought their staff was too large, or whatever other reason influenced them, does not appear and is not material. That being the object of the payment, I cannot see how it can have been made for the purposes of the trade within the meaning of the rule.

I put a case during the argument by supposing that the

(1) 25 Q. B. D. 351. (2) [1892] A. C. 309.

company were not satisfied with their manager, and wished to engage another. They could properly deduct the salary of the man they engaged; but if they also deducted the amount paid to the manager they dismissed, they would practically be getting an allowance for management twice over.

A further test is this: Suppose the company had never taken this gentleman into their service as manager, but had at once commuted the payment they would have had to make to him as manager, how could it be said that the sum so paid was a sum paid in respect of his services?

There remains one point, that this payment was to some extent in respect of the undertaking of the manager not to do business for any other insurance company, and that this was a distinct advantage to the company, because otherwise he might have taken away business from them. It is said that this shews that the payment was for the purposes of the business. Suppose that they had a manager in their employment who was not under such a restriction, and they agreed on his leaving to compensate him for not going into other employment, could it possibly be said that that was a payment for the purposes of their business within the meaning of the rule? If it could not, the argument fails in this case; for the fact that there was an antecedent bargain cannot affect the question whether the payment was made for the purposes of the business.

I think that the deduction ought not to have been made, and that the appeal should be allowed.

Appeal allowed.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

Solicitors for respondents: *G. L. P. Eyre & Co., for Garnett, Tarbet & Co., Liverpool.*

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[IN THE COURT OF APPEAL.]

GODFREY *v.* GEORGE.

Practice—Order for Payment of Costs, Action upon—Solicitor—Application to strike off Rolls—Attachment—Order XLII., *r.* 24.

An action will lie upon an order of the Court by which a solicitor is ordered to pay the costs of an application to strike him off the rolls, notwithstanding the fact that an unsuccessful application to attach him for disobedience to the order has been made by the person to whom he was ordered to pay the costs.

APPEAL from the judgment of Wright J. at the trial without a jury.

The action was brought for a balance due upon an order of the Queen's Bench Division for the payment of certain costs.

The facts were as follows. A person named Wood had employed the defendant as a solicitor. He subsequently ceased to employ the defendant and transferred his business to another solicitor, who was the plaintiff in the action. An application was then made to strike the defendant off the rolls on the ground that, having in his hands an admitted balance of moneys belonging to his client, Wood, he neglected and refused to pay over the same, and improperly appropriated the same to his own use. Upon this application a Divisional Court ordered that the defendant should pay over forthwith 200*l.* of the money admitted to be due on the accounts between himself and Wood, and should forthwith pay other 131*l.* 13*s.* 10*d.* of such admitted sum into court to abide the further order of the Court; and that all the matters of the affidavits filed upon the application should be referred to a master to inquire into and report upon to the Court. When the case came on again for hearing on the master's report, no order was made to strike defendant off the rolls, but by consent of the parties the Divisional Court made an order that the sum of 131*l.* 13*s.* 10*d.* paid into court should be paid out to the plaintiff, as solicitor for Wood, and that the defendant should give security for the further sum of 102*l.* 7*s.* 10*d.* due from him to

Wood by certain bills of exchange to be drawn by the defendant upon his wife and indorsed by the defendant; and that the costs of the proceedings should be taxed as between solicitor and client and paid by the defendant to the plaintiff. It appeared that Wood had assigned to the plaintiff all moneys due from the defendant. The costs of the proceedings upon the application to strike the defendant off the rolls were taxed at 142*l.* 2*s.* 6*d.* A part of this amount only having been paid, an application was made by the plaintiff for a writ of attachment against the defendant for disobedience of the order of the Court. The Court, however, refused the application. The plaintiff then brought an action upon the order as upon a judgment for the amount of the costs remaining due. The learned judge gave judgment for the plaintiff for the sum claimed.

Crump, *Q.C.*, and *Lewis Thomas*, for the defendant. Before the Judicature Acts, it was clear law that an action would not lie upon an order of the Court as distinguished from a judgment: see *Dent* v. *Bashan* (1); *Hookpayton* v. *Bussell*. (2) By Order XLII., r. 24, it is provided that "every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." It has been held that the rule gives a right of action upon orders to which it is applicable: *Philpott* v. *Lehain* (3); *Norton* v. *Gregory*. (4) It is contended, however, that it is applicable only to orders made in the course of an action or other civil proceeding of a similar nature, and not to an order such as that upon which the plaintiff sues. Although no order was made against the defendant as for misconduct, the order was, nevertheless, one made in a quasi criminal matter: *In re Freston*. (5) It was made in the exercise of the disciplinary jurisdiction of the Court over a solicitor as its own officer. It cannot have been intended that such an order should be enforceable as a judgment in favour of an individual. The defendant was ordered to pay these costs in the character of an officer of the Court, and, for disobeying

(1) 23 L. J. (Ex.) 161.
(2) 10 Ex. 24.
(3) 35 L. T. 855.
(4) 73 L. T. 10.
(5) 11 Q. B. D. 545.

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such an order, the proper remedy is by application for attachment, not by action: see *Norton* v. *Gregory*. (1)

The plaintiff, after electing to pursue this remedy by attachment under the disciplinary jurisdiction of the Court, cannot have recourse to the civil remedy by action. [They also cited *In re Dudley* (2); *In re Grey*. (3)]

Marshall, Q.C., and *Pollard*, for the plaintiff. The case of *In re Hardwick* (4) is an express authority that an application to strike a solicitor off the rolls is not a criminal matter. The order sued upon is within the terms of Order XLII., r. 24. The case of *In re Boyd* (5) clearly shews that an action will now lie upon such an order for payment of costs. There is absolutely no authority for the suggestion that an unsuccessful application for an attachment for disobedience of such an order is a bar to a subsequent action upon it; and it is submitted that, on principle, it cannot be so. There can be no question of election between alternative remedies. The application for an attachment is not, properly speaking, a remedy for the recovery of the money. Any person may inform the Court for the purposes of the exercise of its disciplinary jurisdiction. The motion for an attachment need not necessarily be made by the person to whom the solicitor has been ordered to pay money.

LORD ESHER M.R. In this case the action is brought upon an order of the Court, by which the defendant was ordered to pay the costs of certain proceedings. There was an application to strike the defendant off the rolls for misconduct as a solicitor in appropriating to his own use money belonging to his client. Upon that application the Court made an order that he should pay to the plaintiff the taxed costs of the proceedings. These costs were taxed, and so the order became an order to pay the amount ascertained to be due on the taxation. It is said that this order is not within the terms of Order XLII., r. 24, because it was an order to pay costs made in a matter which was in the nature of a criminal matter. But

(1) 73 L. T. 10.
(2) 12 Q. B. D. 44.
(3) [1892] 2 Q. B. 440.
(4) 12 Q. B. D. 148.
(5) [1895] 1 Q. B. 611.

the case of *In re Hardwick* (1) is an express decision by the full Court of Appeal that an application to strike a solicitor off the rolls is not a criminal matter. Therefore this is an order in a civil matter, and it is an order for payment of a sum of money. It seems to me to come exactly within the terms of rule 24 of Order XLII., and therefore it may be enforced by action as if it were a judgment.

But, secondly, it was argued that the remedy was to attach the defendant for disobeying the order, and not by action. No doubt he could be attached for such disobedience, because the order was made against him in the exercise of the disciplinary jurisdiction of the Court over him as its officer. It does not, however, follow that, because he could be attached, therefore an action will not lie against him on the order. Several cases have been cited which shew that an action will lie on such an order. Therefore, there were these two modes of proceeding against him. He might be attached, or an action might be brought against him upon the order. It was said that, under these circumstances, the person to whom these two remedies are open must elect which he will pursue. I see no ground for this contention. If an order for attachment had been made, and the defendant had been attached and lodged in prison under that order, there might be some ground for the contention that the plaintiff could not afterwards bring an action because the imprisonment had operated as a satisfaction of his claim. But that is not this case. It is constant practice that, where a person has two remedies, he may pursue them both, and, unless his claim is satisfied by means of one of them, he is not prevented from pursuing the other. Here the plaintiff endeavoured to enforce his claim by a motion for attachment, but the Court refused his application. He therefore failed to obtain satisfaction of his claim by means of that proceeding, and is entitled to pursue the remedy by action. For these reasons I think the appeal should be dismissed.

LOPES L.J. I agree. The order sued upon was made upon an application that the defendant should be struck off the rolls.

(1) 12 Q. B. D. 148.

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Lopes L.J.

It is contended that the action will not lie, one of the grounds taken being that the order was made in a matter of a criminal nature, and therefore is not within Order XLII., r. 24. The decision in *In re Hardwick* (1) is a conclusive authority to the effect that such a matter is not a criminal matter. That being so, it seems clear upon the authority of the cases of *Philpotts* v. *Lehain* (2) and *Norton* v. *Gregory* (3) that an action will lie on an order of this kind by virtue of Order XLII., rule 24.

But then it was contended that the action is not maintainable because there was a remedy by attachment, and the plaintiff, having moved for an attachment against the defendant, is ousted of his remedy by action. If the writ of attachment had been issued, and the defendant had been imprisoned under it, it might possibly be contended that, by analogy to what was formerly the effect of imprisonment under a writ of ca. sa., the remedy by action was ousted; but it is to be observed that in this case the motion for an attachment failed. It seems to me clear that under these circumstances the plaintiff can maintain his action. The application for an attachment having failed, he is entitled to betake himself to the remedy by action.

KAY L.J. Order XLII., r. 24, provides that "every order of the Court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect." In this case an application had been made to strike a solicitor off the rolls for not paying over money belonging to his client, but appropriating it to his own use. When the matter ultimately came on for hearing, an order was made by consent directing that security should be given by the solicitor for a sum of 102*l.* 7*s.* 10*d.*, and that he should pay the taxed costs of the proceedings. It is clear from the authorities that the application to strike the defendant off the rolls was not a criminal matter, and also that an action may be brought upon an order of this kind, because that is a mode of enforcing a judgment. The order is not a judgment, but by Order XLII., r. 24, it may be enforced as if it were.

An application was made to commit the defendant for

(1) 12 Q. B. D. 148.

(2) 35 L. T. 855.

(3) 73 L. T. 10.

contempt in not paying these costs, but no order was made on that application. It was argued that, after having recourse to the remedy by attachment, the plaintiff cannot maintain an action on the order. I do not think it is an accurate use of language to speak of the disciplinary jurisdiction of the Court to commit for contempt in such a case as if it were merely a remedy for the recovery of money. It is a mode in which the Court deals with its own officer with the object of punishing him and preventing others in the same position from acting in a similar way. Of course the result of an application to the Court to exercise this jurisdiction may very often be the payment of the money which should have been paid; but that ought not to be treated as the object of such an application. This disciplinary jurisdiction may be put in motion not only by the person to whom money is ordered to be paid, but by any other person. It is not merely or primarily a remedy for the recovery of money. That being so, how can it be argued that, because recourse has been had to that jurisdiction, and an unsuccessful application has been made to commit a solicitor for misconduct as an officer of the Court in not paying the sum of money which he has been ordered to pay, that the remedy by action upon the order is taken away? It seems to me that such an application is made for a different purpose, and under a special jurisdiction. I do not see how the mere making of an application for an attachment, though it be made by the person to whom the money is ordered to be paid, can possibly deprive him of his remedy by action. In this case the application for an attachment failed. Thereupon this action was brought. I think the learned judge was right in holding that it could be maintained. It is not necessary for the purposes of this case to decide whether, if the writ of attachment had been issued and the defendant had been imprisoned under it, the plaintiff would have been deprived of his remedy by action, and I desire to reserve my judgment on that point. For these reasons, I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for plaintiff: *Marshall & Marshall.*
Solicitors for defendant: *Foss & Ledsam.*

E. L.

1895
Nov. 11;
Dec. 7.

HART *v.* BEARD.

Local Government—Parochial Elector—Parish in Parliamentary Borough—Freemen—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 2, *sub-s.* 1; *s.* 75, *sub-s.* 2.

The fact of a person being on the list of freemen for a parliamentary borough does not entitle him to have his name entered in the parochial electors' list for a parish within the borough, even though he may reside within the parish; the list of freemen not being a "portion of the parliamentary register of electors relating to the parish" within the meaning of s. 2, sub-s. 1, of the Local Government Act, 1894.

CASE stated by the revising barrister for the borough of Coventry.

The appellant, Walter Edward Hart, residing in the parish of Holy Trinity Within, in the city of Coventry, which is a parliamentary borough, claimed to have his name entered on the parochial electors' list for the said parish as being a freeman of the city of Coventry. Although residing within the borough he did not occupy any lands or tenements within it, and had no qualification for the parliamentary franchise other than as a freeman. The council of the city, from time to time as the polling districts were altered, by resolution allotted the freemen of the borough to such polling districts as were by reason of proximity to their dwellings most convenient. On the parliamentary register for the borough of Coventry the names of freemen, whether residing within or without the borough, do not appear under the heading of a parish, but are placed in a separate list headed simply with the name of the polling district, no reference being made to the parish in which they reside. The revising barrister disallowed the appellant's claim, as also those of fourteen other persons who claimed under similar circumstances, those persons having no qualification other than as freemen, but residing within the borough. He consolidated the appeals, making the town clerk of Coventry respondent.

T. W. Chitty, for the appellant. By s. 75, sub-s. 2, of the

Local Government Act, 1894 (1), the qualification of a parochial elector in a parish in an urban district is the same as that of a parochial elector in a rural district. That refers to s. 2, sub-s. 1, by which the qualification is stated to be that the person is "registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish." The appellant has not got an occupation qualification, and therefore is not on the local government register, but, being a freeman, he is on the parliamentary register, and, as he resides within the parish of Holy Trinity Within, he is on the portion of the parliamentary register relating to that parish. By s. 13 of the Parliamentary Voters Registration Act, 1843 (6 & 7 Vict. c. 18), the overseers of every parish or township are to publish lists of persons (other than freemen) who are entitled to vote; and by s. 14 the town clerk of every borough is to publish similar lists of freemen. Then by s. 48 the revising barrister is to deliver the lists of voters for each borough (which includes the lists of freemen as well as those of non-freemen) to the town clerk, who is to enter them in a book in the same manner as the county lists are entered. And by s. 47 the clerk of the peace for each county is to enter the county lists in a book "arranged with the names in each parish or township." Therefore, freemen, like other voters, are entitled to have their names entered in the parish in which they reside. And the parliamentary register of freemen should be so arranged, and the Court will treat the register as though it in fact had been so arranged.

Carver, for the respondent. The appellant's view as to s. 47 of the Act of 1843 is one which has in practice never been adopted. The arrangement of the voters' names there prescribed has always been treated as applying only to the lists of voters

(1) By the Local Government Act, 1894, s. 2, sub-s. 1, "The parish meeting for a rural parish shall consist of the following persons, in this Act referred to as parochial electors, and no others, namely, the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish."

Sect. 75, sub-s. 2: "The expression 'parochial elector' when used with reference to a parish in an urban district . . . . means any person who would be a parochial elector of the parish if it were a rural parish."

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other than freemen prepared by the overseers under s. 13. Moreover, the list of freemen who are entitled to be on the parliamentary register includes many persons who do not reside in any parish at all within the borough. It is a sufficient qualification that the freeman resides within seven miles of the borough: see s. 32 of the Reform Act, 1832. But if all voters are entitled to have their names arranged under some parish, how are the freemen resident outside the borough to be allotted to the parishes within the borough? Although a freeman is required by the last-mentioned section to reside for six months within the borough or within seven miles of it, he is not required to reside in the same house or parish for that period. Suppose, then, during the six months he resides in several different parishes in the borough, under which parish is his name to be placed? If a freeman is entitled as such to be a parochial elector in any one parish, he is entitled to be an elector in all the parishes in the borough, for he is qualified throughout the borough. The Local Government Act, 1894, was passed with knowledge of the existing practice of keeping the freemen's and non-freemen's lists separate.

Chitty, in reply.

Cur. adv. vult.

1895. Dec. 7. The following written judgments were delivered:—

LORD RUSSELL of KILLOWEN C.J. This is an appeal from the revising barrister at Coventry, who rejected the claim of the appellant to have his name entered on the list of parochial electors for the parish of Holy Trinity Within. The appellant is a freeman of the city of Coventry, and by virtue of his being a freeman entitled to exercise the parliamentary franchise for the borough; but he has no other qualification. The names of the freemen are entered on the parliamentary register, but not, as those of other voters are, under the heading of a parish. They are placed in a separate list simply with the name of the polling district to which they have been allotted. The difficulty then arises under s. 2, sub-s. 1, and s. 44, sub-s. 1, of the Local

Government Act, 1894, by which "Parochial Electors" and "Register of Parochial Electors" respectively are defined. Sect. 2 is as follows:—

"The parish meeting for a rural parish shall consist of the following persons, in this Act referred to as parochial electors, and no others, namely, the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish." The material part of s. 44, sub-s. 1, is as follows: "The local government register of electors and the parliamentary register of electors, so far as they relate to a parish shall, together, form the register of the parochial electors of the parish."

The appellant and others are admittedly not on the local government register of electors; and the question is whether, not being registered in a portion of the parliamentary register which relates to the parish, they are entitled to be placed on the register of parochial electors. It is agreed on both sides that this method of dealing with the names of freemen has been the practice for a long time; and it seems to me that the Legislature must be taken to have cognizance of this practice. I find it, therefore, impossible to get over the plain words of both sections; and I think the revising barrister was right, and that he could not, having regard to the words "no others" in s. 2, sub-s. 1, have properly placed these freemen on the parochial electors' register. But the appellant's counsel contended, even if the revising barrister were right, that by reason of ss. 47 and 48 of 6 & 7 Vict. c. 18 (the Parliamentary Voters Registration Act, 1843), the name of the appellant ought to have been placed by the town clerk under a parish in the parliamentary register—in other words, that by virtue of those sections it is the duty of the town clerk to put every name under a parish. In my judgment, this question is not properly raised in the case before us. I think the revising barrister had no power to do what is now contended ought to have been done by the town clerk. But, as the question of the right of freemen to be placed on the parliamentary register under a parish has been fully argued before us, I think it proper to express my judgment

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upon that point. The sections relied on are ss. 47 and 48 of 6 & 7 Vict. c. 18. I do not read these sections in the sense contended for. The duty imposed on the town clerk, when the list of voters is received from the revising barrister, is, I think, merely to have the names which appear as belonging to a parish or township printed or arranged in alphabetical order. I cannot find any direction to place every name under some parish, which is the appellant's contention. The difficulty would arise as to the parish to which a freeman should properly be allotted. Upon what principle is the town clerk to proceed? It is suggested that he ought to allot the freeman to the parish in which he lives. I find no such principle laid down in the Act. And what is to be done with freemen residing outside the parliamentary limits? As to these the learned counsel suggested that there was a difference between outside residents and inside residents; but I can see no grounds for this suggestion. If freemen quâ freemen are entitled to be put on the parliamentary register in a manner to give them parochial franchises, I do not see that they can properly be divided into resident and non-resident classes. By such residence as the resident freemen have, they have no parochial rights of franchise. In my judgment, therefore, the contention of the appellant fails on both grounds. It is clear to my mind that the Legislature intended by its definition of parochial electors to include only those persons who had the qualification either of ownership or of occupation of land or houses within the parish. This the freemen may or may not have; but if the appellant's contentions are correct they would all have to be treated on the same footing. Their franchise is a purely personal one, in no way dependent on ownership or occupation; and I think that in the absence of any other qualification they are rightly excluded from the parochial electors. It seems to me, moreover, that if the mere fact of being on the parliamentary register as a freeman were a sufficient qualification, then the freemen would, under s. 44, sub-s. 4, of the Local Government Act, 1894, be equally qualified as parochial electors in *all* the parishes in the borough, there being no reason why

they should belong to one more than another. The appeal will be dismissed with costs.

GRANTHAM J. In my judgment the revising barrister was right, and this appeal must be dismissed. From the statements made in the course of the argument, it is evident that since the Reform Act of 1832 freemen have been put in a separate list in the poll-books for the boroughs of England where freemen have votes. Practically from that time the freeman's franchise, though an ancient one, became an anomaly in our electoral system, and, the vote being often in respect of personal qualifications such as birth and parentage, it was very desirable to keep the list of freemen voters separate from the parish list of those who voted for qualifications existing in the parish in which their names were entered. Many of the freemen did not live in the borough at all, so that there was of necessity a separate list for them apart from the list of the ordinary voters who lived in and voted for qualifications in the various parishes of the borough. By ss. 13 and 14 of the Registration Act of 1843 it is clear that separate lists were to be made out by the overseers and town clerk respectively; and I can see nothing in ss. 47 and 48 to shew that these lists were ever to be amalgamated or mixed up, and it would be strange, indeed, if that had been the intention of the Legislature, that that intention had never had effect given to it. As the Local Government Act of 1894 would not apply to freemen—or rather freemen as such would not be included in the term parochial electors as defined by that Act, because they did not appear in such portion of the parliamentary register of electors as relates to the parish—it is a most unusual request to ask us to treat them as if they had been in that list, because as they were not in the list we must assume that it was not intended to include them as parochial electors as they were not mentioned. And I do not see how under any circumstances the revising barrister could have included them. The clerk of the peace and the town clerk respectively prepare the lists for the revising barrister, and he does not alter the way in which the lists are made up. If the appellant wishes to succeed he must

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therefore get the lists altered by them—though how he is to do that unless he can do it by mandamus I do not know. At any rate, that is not the application before us, and this appeal must be dismissed.

VAUGHAN WILLIAMS J. concurred in the judgment of the Lord Chief Justice.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Parker & Co., for Hughes & Masser, Coventry.*

Solicitors for respondent: *Crowders & Vizard.*

J. F. C.

1895
Oct. 26.

TANNER *v.* OLDMAN.

Metropolis—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 212—*Exemptions—Contract entered into before passing of Act.*

The exemption from the operation of the London Building Act, 1894, contained in s. 212 of that Act in favour of buildings to be carried out under a contract entered into before the passing of the Act applies not merely to buildings to be erected under a contract with a builder according to definite plans and specifications, but also to buildings to be erected under a building agreement for the development of a building estate, the complete performance of which may extend over a period of years.

CASE stated by a metropolitan police magistrate under 20 & 21 Vict. c. 43, and 42 & 43 Vict. c. 49, from which the following facts appeared.

On March 16, 1895, the respondent, a builder, served upon the appellant, the district surveyor under the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), for the district of Hatcham, a notice that he intended to build five dwelling-houses on the north side of Musgrove Road, Deptford. This notice, although in form a notice under the Metropolitan Building Acts previously in force, was to be taken as a building notice duly served under s. 145 of the Act of 1894, and plans of the house proposed to be first erected were about the same time delivered to the appellant. The appellant considered that it was pro-

posed to erect the house in contravention of the terms of the London Building Act, 1894, and on March 18, 1895, served upon the respondent a notice under s. 150 of that Act of objection to the proposed buildings; whereupon the respondent appealed in accordance with the same section to a metropolitan police magistrate.

Upon the hearing of the appeal it appeared that under a building agreement in writing, dated January 3, 1894, and made between the Haberdashers' Company of the one part and the respondent of the other part, the respondent agreed to erect on the ground delineated in the plan not less than forty-three houses of such classes and descriptions, &c., as should be previously approved by the company's surveyor: five of the houses (being the houses mentioned in the building notice) were to be erected on the north side of Musgrove Road at a cost of not less than 380*l.* each; the plans, elevations, and specifications of the works were to be approved before commencement by the said surveyor. The forty-three houses were to be completed by various dates, and the whole of them were to be finished by March 25, 1899. It was also provided by the agreement that all the works should be executed in accordance with the requirements of the Metropolitan Building Act and any other Act of Parliament, whether local or general, for the time being affecting the premises, and of the Greenwich District Board of Works and of any other body for the time being having jurisdiction over the premises. The agreement further provided for the rents to be paid by the respondent to the company, and for the granting of leases, and contained all the usual provisions of a building agreement. The agreement was entered into bonâ fide and without any intention of evading the London Building Act, 1894, which was passed on August 25, 1894, and came into operation on January 1, 1895. There was no evidence of the approval of the surveyor of the Haberdashers' Company of the plans, &c., of the five houses proposed to be built.

The proposed buildings would have satisfied the requirements of the Metropolitan Building Acts in force previously to the passing of the London Building Act, 1894.

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The respondent relied upon s. 212 (1) of the London Building Act, 1894, and contended that the intended buildings were, having regard to the facts herein stated, works to be carried out under a contract entered into before the passing of the Act within the meaning of that section; and, further, that the intended buildings did comply with the provisions of that Act.

The appellant contended that s. 212 applied only to what is spoken of in the building trade as a contract, namely, a contract for the erection of specific buildings at a fixed price, that the proposed buildings could not be said to be "carried out" under the building agreement (especially as no plans had been submitted to or approved by the grantors) or to be "completed" within the meaning of the section, and that the proposed buildings did not comply with the Act in the matters specified in the notice of objection.

The learned magistrate did not enter upon the question whether the proposed buildings complied with the said Act, or hear any evidence as to the meaning of the word "contract" in the building trade, being of opinion that the said building agreement was a contract within the meaning of s. 212; he therefore disallowed the objections subject to this case.

The question of law for the opinion of the Court was whether upon the true construction of s. 212 of the London Building Act, 1894, and on the facts stated in the case, the proposed buildings must as regards thickness of walls and otherwise conform to the requirements of the said Act.

Cripps, Q.C. (*Daldy*, with him), for the appellant. The proposed buildings were not being carried out under a contract entered into before the passing of the Act of 1894. The exemption in s. 212 is applicable only to a contract entered into with a builder for the erection of a house according to

(1) By the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 212, "notwithstanding anything contained in this Act a building, structure or work which has been commenced before and is in progress at the commencement of this Act or which is to be carried out under any contract entered into before the passing of this Act may be completed subject to and in accordance with the provisions of the Acts relating thereto as in force immediately previous to the passing of this Act."

definite plans and specifications; it does not apply to an ordinary building agreement for the development of a building estate which may run over many years before it is fully carried out, and in the present instance must do so. This seems to have been present to the minds of the parties when they introduced the proviso that the work was to be executed in accordance with the requirements of the Metropolitan Building Act and any other Act, whether local or general, for the time being affecting the premises. The contract in the present case is not a contract for "carrying out" a building.

Jelf, Q.C. (*Grain* with him), for the respondent. The case falls within the exemption contained in s. 212. The word "contract" should bear its ordinary meaning; and it is impossible to successfully contend that this agreement was not a contract in the ordinary meaning of that word, or that these buildings were not to be carried out under that contract.

Cripps, Q.C., in reply.

CAVE J. I am of opinion that this appeal must be dismissed. The point raised in the case is a comparatively small one, and does not admit of much argument; but it is one of some importance to persons who, before the passing of the recent Act, had entered into contracts for the erection of houses in the metropolis. The only question which arises upon a consideration of s. 212 is, whether these buildings were to be carried out under a contract entered into before the passing of the Act. To that question there can be only one answer. Several buildings were to be erected under such a contract; and under that contract alone was it proposed to erect them. But for the existence of this building agreement, the respondent would have been a trespasser, if he had entered on the land and commenced to build. We are asked to place a narrow construction upon the word "contract" in this section, and to say that it must be construed as equivalent to "specification"; but I see no reason for doing so. If the Legislature had meant to exempt only buildings that were to be carried out under a specification, it would have been easy to say so in plain and unmistakable language. No doubt a specification is generally part of a

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building contract; but it is not the contract under which the building is carried out; and, when the time arrives in the present case for carrying out the buildings, they will be carried out under this agreement or contract, and no other. The learned magistrate placed upon the word "contract" its plain meaning; and there are no grounds for our placing a restricted meaning upon it.

WRIGHT J. I am of the same opinion. I cannot help thinking that when we are considering an Act of Parliament like the present one, which is a local and personal Act, we ought to treat a section like s. 212 as being in the nature of a compromise entered into by parties having conflicting interests, and that we ought to place the widest possible construction on the section. At any rate, I can see no sufficient ground for narrowing the ordinary meaning of the language used.

Judgment for the respondent.

Solicitor for appellant: *Blaxland.*
Solicitors for respondent: *Watson, Sons & Room.*

W. J. B.

1895
Nov. 12.

THE QUEEN *v.* JENNINGS AND ANOTHER.

Justices—Jurisdiction—Industrial Schools Act, 1866 (29 & 30 *Vict. c.* 118), *s.* 14.

The Industrial Schools Act, 1866, does not contain a code of criminal procedure and is not punitive in its character, but is intended for the protection of children coming within its operation. Where, therefore, a child apparently under fourteen years of age is charged before a court of summary jurisdiction with larceny, and the charge is dismissed, but evidence is given that he frequents the company of reputed thieves, he may be sent to an industrial school under s. 14 of the Act, upon an application under that section, without being brought afresh before the Court by summons or otherwise.

RULE NISI for a certiorari to bring up and quash an order made by justices of the South Roborough division of Devonshire.

From the affidavit filed by the respondent justices it appeared that a boy named Symons, who was under fourteen years of

age, was summoned before them upon a charge of larceny. After hearing the statements of the prosecutor and of the school board officer, the justices thought the case was one which should be dealt with under the Industrial Schools Act, 1866, and therefore dismissed the summons, and, upon the application of the superintendent of police to deal with the boy under that Act, proceeded to hear and adjudicate on such application. Evidence was then given on oath which satisfied the justices that the boy was the associate of thieves, and that his parents had no control over him. The father of the boy had been warned to appear before the justices, but sent his wife, who raised no objection to the proceedings, at the conclusion of which the justices made an order under s. 14 (1) of the Act that the boy should be sent to a certified industrial school and detained there until the age of sixteen. Proceedings were subsequently taken before justices to compel the father to contribute to the boy's maintenance, when the objection was taken that the original order was made without jurisdiction, and the proceedings were adjourned pending this application for a writ of certiorari.

E. U. Bullen, for the applicant. The order of justices was made without jurisdiction. After the charge of larceny was dismissed, the justices had no power to proceed against and punish the boy under a different Act unless he was brought afresh before the Court upon a substantive charge under that Act. The language of s. 14 of the Act of 1866 is that any person may "bring" before justices children under fourteen coming within certain descriptions, and the word "bring" in that section has received judicial interpretation: it means either a forcible bringing or a bringing by process of law—that is, by

(1) By 29 & 30 Vict. c. 118 (The Industrial Schools Act, 1866), s. 14, "Any person may bring before two justices or a magistrate any child apparently under the age of fourteen years that comes within any of the following descriptions, namely . . . . That frequents the company of reputed thieves. The justices or magistrate before whom a child is brought as coming within one of those descriptions, if satisfied on inquiry of that fact, and that it is expedient to deal with him under this Act, may order him to be sent to a certified industrial school."

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summons: *Reg.* v. *Moore.* (1) A fresh summons should have been issued in the present case under which the boy could have been "brought" before the justices; what has been done is to summon him in respect of one offence and convict him of another; such a conviction is bad: *Martin* v. *Pridgeon* (2); *Reg.* v. *Brickhall* (3); *Blake* v. *Beech.* (4) [He also cited Stone's Justices' Manual, 28th ed. p. 47.]

LORD RUSSELL of KILLOWEN C.J. In this case a rule nisi was granted to bring up an order of justices by which they, purporting to act under the Industrial Schools Act, 1866, ordered the child of the applicant to be sent to a certified industrial school, the rule being obtained on the ground that the justices acted without jurisdiction. The argument on this allegation of want of jurisdiction resolved itself into two heads: first, that there was no evidence on which the justices could act, so to bring the case within s. 14; and, secondly, that they could not deal with the child and make an order to send him to an industrial school unless a specific charge were formulated in addition to the subject-matter of the charge for larceny, and unless the child were brought before them on that specific charge. As to the first contention, the affidavit satisfies me that there was ample evidence to bring the case within s. 14. Then comes the main point raised, that, the boy having been brought before them on a charge of larceny, the justices could not deal with him by making the order which in fact they made, unless and until he was brought before them by a substantive proceeding, by summons or otherwise, charging him with an offence under s. 14. Upon that point cases have been cited to us, the authority of which I recognise and with the decisions in which I agree; they have, however, no application to the present case. The scheme of the Industrial Schools Act shews that it is not a code of criminal procedure, and is not punitive in its character; it is, on the contrary, benevolent in its aims and operation, and is intended to protect those children who come

(1) 52 J. P. 375.
(2) 1 E. & E. 778; 28 L. J. (M.C.) 179.
(3) 33 L. J. (M.C.) 156.
(4) 1 Ex. D. 320.

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within its protection. From several of the descriptions in the Act it is clear that the sending a child to an industrial school for the sake of the care and protection there afforded him is an alternative to the infliction of punishment upon him, even though he may have committed a criminal offence. The scheme of the Act is that if a child is brought before justices, whether by summons or in any other mode, and if the circumstances make it desirable that he should be dealt with under s. 14 or s. 15, and the facts bring the case within either of those sections, the justices may, at their discretion, and without the necessity of any fresh substantive proceeding, deal with him under the statute. In the present case I am clearly of opinion not only that the action of the justices was within their powers, but also that their powers have been wisely exercised. The boy was wholly beyond parental control; and when he was charged with larceny notice was given to his parents to attend before the justices. His mother did in fact attend, and no objection was made by her to the order of the justices; nor did the father raise any until it was sought to compel him to contribute to his son's support in the industrial school. The rule must be discharged.

GRANTHAM and VAUGHAN WILLIAMS JJ. concurred.

Rule discharged.

Solicitors for applicant: *Law & Worssam, for Bond, Pearce & Bickle, Plymouth.*

W. J. B.

C. A.
1895
Nov. 15.

[IN THE COURT OF APPEAL.]

In re GALLARD.
Ex parte GALLARD.

Bankruptcy — Member of Committee of Inspection—"Profit derived from Transaction arising out of the Bankruptcy"—Sanction of Court—Solicitor to Trustee—Bankruptcy Rules, 1886, *r.* 317.

By rule 317 of the Bankruptcy Rules, 1886, "No member of a committee of inspection of an estate shall, except under and with the sanction of the Court, directly or indirectly, . . . be entitled to derive any profit from any transaction arising out of the bankruptcy, or to receive out of the estate any payment for services rendered by him in connection with the administration of the estate":—

Held, that the sanction of the Court under this rule cannot be given after the profit has been derived, but must be obtained before the business from which the profit is to be derived is undertaken:

Held, also (reversing the decision of Vaughan Williams J.), that the "profit derived" by a solicitor is the amount of his costs, less his disbursements out of pocket in the particular matter, and that no allowance can be made to him in respect of his general office expenses.

Per Lord Esher M.R.: When one of the members of a committee of inspection is the managing clerk of a solicitor, though it is not a breach of rule 317 to appoint that solicitor to be solicitor to the trustee in the bankruptcy, yet on general principles such an appointment would be improper, and would be set aside by the Court on application for the purpose.

APPEAL by a creditor in the bankruptcy of George Gallard against an order of Vaughan Williams J. varying the taxing master's certificate of his taxation of the bill of costs of the solicitors to the trustee in the bankruptcy.

The amount of the bill had been paid by the trustee to the solicitors, and the order for taxation was made at the instance of the creditor, with the view of the trustee being disallowed a part of what he had paid.

The trustee, with the permission of the committee of inspection, appointed Messrs. Ashurst, Morris & Co. to be solicitors to the trustee in the bankruptcy. One of the members of the committee was a Mr. Hunt, who was a managing clerk of Messrs. Ashurst, Morris & Co.; another member was a Mr. Williams, a solicitor at Brighton. Messrs. Ashurst,

Morris & Co. employed Mr. Williams as their agent in some proceedings in the bankruptcy taken at Brighton. No prior sanction of the Court to his employment had been obtained. The bill of costs delivered by Messrs. Ashurst, Morris & Co. included a sum of 139*l.* 6*s.* 11*d.* for the costs of Mr. Williams.

The taxing master, by reason of rule 317 of the Bankruptcy Rules, 1886, disallowed the whole of this sum except 11*l.* 3*s.* 7*d.* for disbursements out of pocket, holding that the remainder represented the profits derived by Williams from the business. The learned judge held that Williams was also entitled to an allowance for the proportion of his office expenses (such as clerks' salaries, rent, &c.) attributable to the particular business, and he disallowed only the sum of 40*l.*, as representing the profit derived by Williams from the business, allowing, therefore, the sum of 88*l.* 3*s.* 4*d.* out of the 128*l.* 3*s.* 4*d.* which the taxing master had disallowed.

With regard to the costs of Mr. Williams, it was admitted in the course of the argument that he was entitled to be allowed an additional sum of 14*l.* 7*s.* 6*d.* for out of pocket disbursements, and the appeal was limited to a sum of 73*l.* 15*s.* 10*d.*, part of the amount allowed by the learned judge.

Cooper Willis, Q.C., and *Æneas Macintosh*, for the creditor. Rule 317 (1) of the Bankruptcy Rules, 1886, applies. The sanction of the Court to the employment of Mr. Williams could not be effectually given after his employment had commenced; it was essential that it should be given before he undertook the work from which he was to derive profit.

The profit which a solicitor derives from any business is the amount of his costs, less disbursements out of pocket. No allowance should be made in respect of his general office expenses.

(1) By rule 317, "No member of a committee of inspection of an estate shall, except under and with the sanction of the Court, directly or indirectly, by himself or any employer, partner, clerk, agent, or servant, be entitled to derive any profit from any transaction arising out of the bankruptcy, or to receive out of the estate any payment for services rendered by him in connection with the administration of the estate, or for any goods supplied by him to the trustee for or on account of the estate. . . ."

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Herbert Reed, Q.C., and *Muir Mackenzie*, for the trustee. The rule does not say when the sanction of the Court is to be given; it can be given at any time.

The judge was right in allowing the solicitors a part of their office expenses.

LORD ESHER M.R. Notwithstanding the great experience and knowledge of the learned judge, and with all deference to him, I am bound to say that in this case he has done two things with which I, for one, cannot agree. The sanction of the Court, mentioned in rule 317, to the employment of Mr. Williams was not obtained before Mr. Williams acted; and the learned judge held, when the case came before him after the whole transaction was closed, that he could then give the sanction of the Court. In my opinion, upon the true construction of rule 317, he could not give the sanction then. I think that the sanction mentioned in rule 317 must be given before the business from which the profit is to be derived is undertaken. The words of the rule are, "except under and with the sanction of the Court." Now, if the particular moneys in question are "profits," they were not earned or derived *under the sanction of the Court.*

In my opinion, therefore, from beginning to end they must be taken to have been derived without the sanction of the Court, and the learned judge could not give that sanction on the hearing of this application.

Then the second point is this. The rule says that no member of a committee of inspection shall, except under and with the sanction of the Court, directly or indirectly be entitled to derive any profit from any transaction arising out of the bankruptcy. This applies to Mr. Williams. Messrs. Ashurst, Morris & Co., in my opinion, made a mistake in employing him as their agent. The learned judge has, and I have no doubt perfectly rightly, held that they never intended to do anything wrong, and I will take that for granted. There is no imputation whatever upon their personal character or honour. But they made a mistake in employing Mr. Williams to act for them whilst he was a member of the committee of inspection

without having previously obtained the sanction of the Court to their so doing. It is said that he knew more about the bankruptcy than any one else, and that what he has done has been beneficial to the estate. I will not controvert that. But now comes the question, Can Mr. Williams be paid by Messrs. Ashurst, Morris & Co., or by any one, more than his disbursements out of pocket? Can he make any profit out of his employment? Well, the learned judge agreed that he could not make any profit. But the learned judge has said that, when Mr. Williams has been paid all the disbursements out of pocket, the remainder of his charges is not all profit. It is said he keeps an expensive office and employs a large staff of clerks, and that a proportionate part of his office expenses must be deducted, as well as his disbursements out of pocket in the particular matter, and that the residue of his bill of costs, after making those deductions, is all the profit that he derived from the transaction.

I think that is a very dangerous view of the matter. In my opinion a solicitor's "profit" is that which he receives from his bill of costs beyond his disbursements out of pocket in the particular business. In my opinion the taxing master was right in his taxation, and I cannot agree with the lenient view which was taken by the learned judge. The appeal must be allowed.

I desire to add that this case appears to me to raise even a larger question than that which has been brought before us. Messrs. Ashurst, Morris & Co. (I say again without any wrong intention) accepted a retainer from a committee of inspection one member of which was their own clerk. In my opinion that was not good practice, and I think they made a mistake in so doing. I think that under the circumstances they ought, at least, to have obtained the sanction of the Court before they accepted the retainer. In my view, if a solicitor accepts a retainer when a member of a committee of inspection stands to him in the relation in which one of the committee stood here, and an application were made to the Court of Bankruptcy immediately to set aside and disallow that retainer, the inherent power of the Court ought to be exercised in setting it aside.

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LOPES L.J. I am of the same opinion. The true construction of rule 317 is a matter of importance. I understand the rule to mean that the sanction of the Court must be obtained *before* the work in question is done, and that it cannot be obtained afterwards. The sanction of the Court is a condition precedent to the right or power of the member of the committee to do the work. In the present case, Messrs. Ashurst, Morris & Co. employed Mr. Williams, an independent solicitor, as their agent, and we have been told (and I have no doubt correctly) by Mr. Muir Mackenzie that he had special knowledge of the matters in respect of which he was engaged. Messrs. Ashurst, Morris & Co., as it seems to me, made a mistake (I am confident that it was only a mistake) in employing Mr. Williams while he was a member of the committee of inspection without obtaining the sanction of the Court. Rule 317 thereupon attached, and, under the exigencies of that rule, he was not entitled to derive any profit from any transaction arising out of the bankruptcy. All his out of pocket disbursements have been paid. Then the question arose whether he was entitled to have a further sum of about 115*l.* which he claimed. The learned judge came to the conclusion that he was entitled to the whole of that sum, except 40*l.*, which the learned judge thought represented the profit arising out of the transaction, and he attributed the rest to a proportionate part of the solicitor's office expenses.

I have great difficulty in seeing how he could have done that. So far as I can see, the expenses of the office were in no way increased by anything which was done in connection with the bankruptcy; and in my opinion the solicitor was not entitled to deduct anything for those expenses. He was only entitled to his out of pocket expenses; and everything beyond that must be regarded as profit.

I come, therefore, to the conclusion that the learned judge was wrong in deducting only the 40*l.* He ought to have deducted all except the out of pocket disbursements. The appeal must be allowed.

KAY L.J. The duties of a committee of inspection in bankruptcy are obvious. They have to watch the administration

of the bankrupt's estate, and to control to any extent they may think right that which is done by the trustee, by the solicitor, or by any one else who takes part in administering the estate.

Rule 317 provides absolutely that no member of the committee shall, except under and with the sanction of the Court, derive any profit from any transaction arising out of the bankruptcy. I agree with what has been said as to the construction of the rule. The words are very clear. He is not to derive any profit "except under and with the sanction of the Court." That must mean at the time when the profit is derived or made. How can he be deriving profit "under the sanction of the Court" unless he has that sanction at the time? He must have the sanction of the Court *then*; and the suggestion that the Court can afterwards, when the thing has been done, say, "We will sanction what has been done although you did not choose to ask the Court for its sanction beforehand," seems to me entirely contrary to both the letter and spirit of the rule. I think the sanction of the Court ought to be obtained *before* the person who requires it does any work which would, if it were paid for, be profitable to him. That is my reading of the rule; and in the present case it is plain that Mr. Williams did not apply for that sanction beforehand. He was a member of the committee and a solicitor; and Messrs. Ashurst, Morris & Co., being the solicitors for the trustee in the bankruptcy, arranged with Mr. Williams that he should act as their agent at Brighton on the usual agency terms; and accordingly, through them, the trustee has paid Mr. Williams for acting as their agent. That Mr. Williams should receive any profit is entirely contrary to the rule. He placed himself in a position in which his duty to keep down the expenses of the administration within reasonable limits was in conflict with his interest, which was to make his profits as agent as large as he could. That is the very mischief which this rule was intended to prevent.

Then it is said that, in fact, the learned judge has not allowed Mr. Williams any profit. How is that? All his disbursements out of pocket have been allowed; but the remainder of his

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charges, it is said, was not all profit, because he has a large office at Brighton, and employs many clerks, and in making up his yearly profits he is accustomed to attribute to each piece of work done in the office a certain proportion of the office expenses, and the remainder only is profit. Therefore, it is said that a proper proportion of the office expenses should be attributed to the sum which Mr. Williams has received from the trustee, and the balance only treated as profit.

This is the first time I ever heard it argued that the profit costs of a solicitor should be ascertained in that way. And when you have such a rule as this, the object of which, as I have already pointed out, is to prevent a member of the committee being placed in a position in which his interest and his duty will conflict, if you were to deal with a solicitor's costs in that way, you would really be nullifying the rule and doing the very thing which it was intended to prevent. He would be paying part of his office expenses (which would be just the same whether he did this business or not) out of what are ordinarily called "profit costs." To that extent, therefore, his interest would be in direct conflict with his duty to keep down the costs as much as he can.

In my opinion this case is entirely within the mischief of the rule as regards those costs which the learned judge has allowed. They were "profit," and also "payment for services rendered by him in connection with the administration of the estate," and I think the judge had no discretion under the rule to allow them. The rule is imperative; and, with deference to the learned judge, I think it ought to be rigorously enforced. In my opinion, the 73*l.* which the learned judge has allowed to the trustee, as paid by him to Mr. Williams, ought to be struck out.

Appeal allowed.

Solicitors: *H. Sowton, for J. C. Buckwell, Brighton; Ashurst, Morris & Co.*

W. L. C.

ELLESMERE BREWERY COMPANY *v.* COOPER AND OTHERS.

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Oct. 30;
Dec. 5.

Principal and Surety—Co-Sureties—Contribution—Material Alteration of Instrument—Discharge.

Where two or more persons join as sureties for a common principal, but bind themselves in different amounts, in the event of the principal being in default they are liable to contribute to the satisfaction of the creditor's claim in proportion to the limits of their respective liabilities, and not in equal amounts.

Four persons, as sureties for a principal, executed a joint and several bond of suretyship, by the terms of which the liability of two of them was limited to 50*l.* each, and that of the other two to 25*l.* each. One of those whose liability was limited to 50*l.*, after the other three had executed the bond, executed it himself, but added to his signature the words "25*l.* only." The obligee accepted the bond so executed without objection, and subsequently the principal became in default:—

Held, that the effect of the added words was to make a material alteration in the bond, so that the three first signatories were thereby discharged from their obligation; and that as the last signatory only executed the bond as a joint and several bond, he also was not bound by it.

APPEAL from county court judge of Shropshire.

The plaintiff company, having appointed the defendant Joseph Cooper as their traveller and agent, required him to give security for the faithful discharge by him of his duties. He accordingly procured the other defendants, Walter Nunnerley, Thomas Emberton, John Pay, and Arnold Bromfield to become sureties for him, and to join him in making a bond whereby they bound themselves jointly and severally to the plaintiffs in a sum of 150*l.* The condition of the bond was that if Cooper should duly account for all moneys received by him as such traveller or agent and faithfully discharge his duties in such capacities, the bond should be void; and it was thereby provided that the liability of Nunnerley and Emberton should be limited to the sum of 50*l.* each, and that of Pay and Bromfield to 25*l.* each. After Cooper, Emberton, Pay, and Bromfield had executed the bond, Nunnerley executed it, but when doing so added to his signature the words "25*l.* only." The plaintiffs'

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manager, who witnessed all the defendants' signatures, accepted the bond so executed without protest. Subsequently Cooper failed to account to the plaintiffs for a sum of 48*l.*, and the plaintiffs sued Cooper and his four sureties upon the bond. The county court judge gave judgment against Cooper; but he gave judgment for the other four defendants on the ground that the addition of the words "25*l.* only" to the signature of Nunnerley was an alteration of the bond which materially affected the position of the sureties, and that they were consequently all, including Nunnerley himself, discharged from liability. The plaintiffs appealed.

A. T. Lawrence, for the plaintiffs. The words added by Nunnerley to his signature may be treated as though they did not appear upon the bond, for, being repugnant to the earlier part of the deed, they are void. Secondly, if they are to be regarded as an alteration of the bond and as forming part of it, the alteration is not material, for it does not affect the rights or liabilities of the co-sureties. The sureties were, no doubt, entitled to contribution inter se; but the amount which each surety is liable to contribute is an equal share of the whole debt subject to this, that it must not exceed the maximum amount for which he is bound. In *Craythorne* v. *Swinburne* (1) Lord Eldon, referring to *Dering* v. *Earl of Winchelsea* (2), treated that case as authority for the proposition that the right to contribute exists not only where the parties are bound in like sums, but also where "they are bound in different sums, except that contribution could not be required beyond the sums for which they had become bound." See White & Tudor L.C. 6th ed. vol. 1, p. 122. Therefore in this case each would be liable to contribute one-fourth of the debt, i.e., 12*l.*, which sum is less than the smaller sum for which Nunnerley bound himself. It must be conceded, however, that in Ireland it has been held, on the contrary, that co-sureties bound in different sums contribute in proportion to the amounts for which they are bound: *In re M'Donaghs.* (3) But that case should not be

(1) 14 Ves. 160, at p. 169. (2) 1 Cox, 318.
(3) 10 Ir. Rep. Eq. 269.

followed. Thirdly, if the other three co-sureties are to be discharged, at any rate Nunnerley must be held to be bound; for he must be taken to have known what the legal effect of his addition to his signature upon the liabilities of his co-sureties would be, and he cannot take advantage of his own wrong.

Hansell, for the defendants. First, the added words are an alteration of the deed, and have the same effect as though the "50*l.*" set against Nunnerley's name in the body of the deed had been erased and "25*l.*" inserted instead. The fact that the alteration comes after the signature is immaterial: see, per Dodderidge J., *Thompson* v. *Butcher*. (1) Secondly, the alteration is material; and in two respects. It affects the rights of the creditors. The fact that the creditors assented to it makes no difference; and this would have been so even though the alteration had not been to their prejudice: *Gardner* v. *Walsh* (2); *Suffell* v. *Bank of England*. (3) The alteration also affects the rights of the co-sureties, for it alters the proportion of their respective contributions. Alderson B., in *Pendlebury* v. *Walker* (4), lays it down that "where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle, but the equitable mode of applying the principle, that they should all contribute equally, if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety." Thirdly, if the three sureties who first executed the bond are discharged, Nunnerley also cannot be held bound; for it is not his deed. He only signed it conditionally on his co-sureties being bound.

A. T. Lawrence, in reply.

1895. Dec. 5. The judgment of the Court (Lord Russell of Killowen C.J. and Cave J.) was read by

LORD RUSSELL of KILLOWEN C.J. This was an action against Cooper and four other defendants who had signed a bond as sureties for Cooper. At the trial before the learned

(1) 3 Bulst. 300, at p. 302.
(2) 24 L. J. (Q.B.) 285.
(3) 9 Q. B. D. 555.
(4) 4 Y. & C. (Exch.) 424, at p. 441.

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county court judge, judgment was given for the plaintiffs as against Cooper, and judgment was given for the four remaining defendants as sureties.

The facts were that Cooper, having become agent and traveller for the plaintiffs, was called upon to give them some security. He accordingly gave the bond in question, in which he was joined by the four other defendants.

The bond was dated April 30, 1894. By its terms the five defendants were jointly and severally bound to the plaintiffs in the sum of 150*l.* It then recited that Cooper had been appointed agent for the company, and stated the condition of the bond to be that, if Cooper duly accounted for all moneys received by him for the plaintiffs, and otherwise performed the duties of his agency, the bond should be void. It then provided that the liability of Nunnerley and Emberton (two of the defendants) should be limited to 50*l.* each, and that of Pay and Bromfield (two other of the defendants) to 25*l.* each. The effect, therefore, of the bond, as drawn, was that the principal and the sureties were jointly and severally bound in the sum of 150*l.*, but that liability could not be enforced against any of the sureties beyond the limit of the sum specified as to each of them. Nunnerley was the last to sign, and his signature thus appears on the bond: "Walter Nunnerley, twenty-five pounds only." The witness to the execution of each of the signatures was Mr. Bruce, the plaintiffs' manager, who, so far as appears, took the bond without making any objection to the manner of Nunnerley's execution; nor was it suggested that Nunnerley had surreptitiously added the qualification of "twenty-five pounds only" to his signature. As no evidence was given on the point, it cannot be assumed that Nunnerley in bad faith sought by the form of his execution of the bond to limit any liability he had previously agreed to undertake. The probability is that in giving particulars of his sureties Cooper had erroneously stated that Nunnerley had agreed to undertake liability to the extent of 50*l.*, whereas he had done so only to the extent of 25*l.* Subsequently Cooper, the principal, received moneys of the plaintiffs to the amount of 48*l.* for which he had failed to account; and judgment was given against him at the trial for that

amount. The contested question was the liability of the other defendants, the sureties. The learned county court judge held that no one of them was liable, and gave judgment for them accordingly. The present appeal is against that judgment.

It was argued for the plaintiffs (1.) that the form of Nunnerley's execution did not constitute an alteration of the bond so as to discharge from liability the three prior executing sureties; (2.) that, if an alteration, it was not a material alteration, and therefore did not discharge such sureties; and, lastly, (3.) that in any case Nunnerley was liable to the extent of 50*l.*, or if not of 50*l.*, at least to the extent of 25*l.*

In my judgment, no one of these contentions is well founded. I think the effect of Nunnerley's mode of execution, on the facts of this case, is substantially the same as if the proviso in the body of the bond had been altered by him before execution by him by striking out 50*l.* and inserting instead 25*l.* It was, therefore, an alteration. Its effect I shall presently discuss.

The argument of the learned counsel for the appellant was, that the loss in question was to be divided into fourths, and that so long as each fourth did not exceed the sum for which each surety had become liable, each of them was bound to pay, and without any right to contribution from his co-sureties, whether the fixed limit of his liability was for the greater or the smaller amount. Here it was said the one-fourth of the loss was 12*l.*, and as Nunnerley had clearly intended to make himself liable, as also had Pay and Broomfield, for 25*l.* each, it was immaterial whether Nunnerley signed for 25*l.* or for 50*l.* Each, it was contended, was bound to pay 12*l.*; and Emberton was bound to bear no more of the loss than the others.

In my judgment, this contention is founded on a misapprehension of the law. It renders it necessary to consider the principle upon which liability of sureties inter se rests. That principle is, that sureties for the same principal and for the same engagement, even although bound by different instruments and for different amounts, have a common interest and a common burthen; so that if one surety who is directly liable to the creditor pays such creditor, he can claim contribution from his co-sureties whose obligation to the creditor he has discharged.

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But how is the amount of the claim to be determined? According to the argument of the learned counsel for the plaintiffs, it is to be determined by the number of the sureties. Thus, if there are four sureties and one of them pays all, he can recover one-fourth, and one-fourth only, of his payment from each of the other three co-sureties. But this is not in all cases true, even where each of the sureties has made himself liable for the same amount. Thus, where four sureties are jointly and severally bound in a surety bond, and one of them pays the amount of the bond, but one of the remaining three sureties is insolvent, the right to contribution against the two other sureties is for thirds, not for fourths, of the sum paid. But how is the amount to be determined, where, although the sureties are jointly and severally bound, there are different limits of liability, as in this case? It is clear that where the full amount of the bond is due and payable to the creditor, that liability can only be enforced against each surety to the limit of the liability fixed in the instrument. In such case there would be no right of contribution, for each would have paid to the limit of his liability. But suppose only half the amount of the bond is due and payable to the creditor, and such amount is paid by one only of the sureties, who has fixed the limit of his liability at one-half the amount of his bond. Could it be said that he had no right to any contribution from his co-sureties? Surely not. The burthen is a common burthen of all, but unequally distributed. By his payment of the loss of one-half the surety has discharged a liability which might have been enforced against the other sureties up to the fixed limit. It would be against all equitable principles that in such a case the other sureties should go free because it happened that the creditor had enforced payment against one only. Again, it is clear that one surety cannot keep for his own sole benefit a security for his suretyship where he is bound with other sureties for the same principal and the same engagement. Suppose, then, that one surety, whose limit of liability was 1000*l.*, has realized 1000*l.* from such security, being bound with three other sureties with a limit of liability of 2000*l.* each, making in all 7000*l.* It is clear that that 1000*l.* must be taken

into account for the benefit of all such sureties inter se. But upon what principle? Surely upon the only principle which will secure its equitable division, namely, proportional distribution. Thus the surety for 1000*l.* would benefit to the extent of one-seventh, and each of the others to the extent of two-sevenths each. The same principle must apply where the burthen has to be distributed. Where the claim of the creditor is to the full amount, each must pay up to the fixed limit of his liability; but where the claim is less than such full amount, and is discharged by one, the claim must be proportionately borne by the others, even where the claim does not exceed the fixed limit of the liability of the surety who has paid.

What I have so far said is, I think, to be gathered from the principles laid down in *Dering* v. *Winchelsea* (1); but in *Pendlebury* v. *Walker* (2) Alderson B. expressly states the rule thus: "where the same default of the principal renders all the co-sureties responsible, all are to contribute; and then the law superadds that which is not only the principle, but the equitable mode of applying the principle, that they should all contribute equally if each is a surety to an equal amount; and if not equally, then proportionably to the amount for which each is a surety." In *Steel* v. *Dixon* (3) Fry J. cites with approval the language I have quoted; and, later, Pearson J., in *In re Arcedeckne* (4), adopts the language of Fry J. (See also *Ellis* v. *Emmanuel* (5) and *Evans* v. *Bremridge*. (6))

Apply this principle to the present case. I assume the bond to have been executed according to its original tenor without qualification or alteration. The total loss being 48*l.*, Emberton, having subscribed for 50*l.* out of the total of 150*l.*, would be liable for one-third; and if he paid no more he would have no claim for contribution; if he paid to the plaintiff more than one-third, he could claim contribution from his co-sureties in the proportion of their subscription. Stated as a sum in proportion, Emberton's liability would be arrived at thus: As 150 is to 50 so is 48 to the result. So worked out, Emberton

(1) 1 Cox, 318.
(2) 4 Y. & C. (Exch.) 424.
(3) 17 Ch. D. 825, at p. 830.
(4) 24 Ch. D. 709, at p. 714.
(5) 1 Ex. D. 157.
(6) 2 K. & J. 174.

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would be liable for 16*l.* only, and if he paid more would have a claim for contribution. In like manner Pay and Bromfield would be liable for 8*l.* each, and Nunnerley for 16*l.* Now, to appreciate the materiality of the alteration, let us consider its effect upon the liability of Nunnerley. He explicitly says, "I execute the bond only on the terms of my liability being limited to 25*l.*" He could not, therefore, in any case be made liable for more. Whether he can be made liable even for the 25*l.* I shall presently consider. What, then, is the effect of the altered limitation to 25*l.* by Nunnerley upon the position of the other three sureties? Take Emberton's position. For simplicity, assume that the total liability to the plaintiff company for 48*l.* has been paid by Emberton. According to the tenor of the bond without the alteration, Emberton would have to bear two-sixths—equal to one-third of the loss; Nunnerley two-sixths—equal to one-third; and Pay and Bromfield one-sixth each. But by the alteration it is manifest that Emberton, who has paid, would not have the same right of contribution against Nunnerley, and if Nunnerley is not bound at all, would have no right of contribution against him. The alteration was then clearly material. It is unnecessary to give similar illustrations as to Pay and Bromfield. The result, therefore, is that neither Emberton, Pay, nor Bromfield can be made liable on this bond. Each of them is entitled to say, "The contract into which I entered was on the basis of Nunnerley being a party to it with a liability of 50*l.* That is not the contract as it now appears from the bond, and I am, therefore, not bound by it." Their position would be still stronger if Nunnerley is not bound by the bond at all. The remaining question then is—is Nunnerley bound at all? I have already intimated, that as he has expressly said, "I shall be liable only for 25*l.*," he cannot be made liable for the 50*l.*; but is he liable even for the 25*l.*? I think he is not. He, in good faith, expressly limits his liability to 25*l.*; but he undertakes that liability not as a separate or independent liability, but as part of a contract in which three other sureties are joining him, against whom in certain eventualities he will have rights of recourse, between whom and himself a common burthen is to be borne, although unequally

distributed. But if in fact such sureties are not bound by the contract (and we have adjudged that they are not), Nunnerley is entitled to say, "This is not the contract into which I have entered, and I am not bound by it."

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The judgment of the learned county court judge must stand, and the appeal will therefore be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Moore & Davies, for Salter & Giles, Ellesmere.*

Solicitors for defendants: *Kennedy, Hughes & Kennedy, for R. E. Lloyd, Ellesmere.*

J. F. C.

BUCKLER, APPELLANT *v.* WILSON, RESPONDENT.

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Aug. 1; *Dec.* 7.

Margarine—Sale contrary to Act—Delivery to Purchaser in Borough—Jurisdiction of County Justices—Time for Service of Summons—Notification to Seller—Condition Precedent—Margarine Act, 1887 (50 & 51 *Vict. c.* 29), *ss.* 6, 7, 12—*Sale of Food and Drugs Acts*, 1875, 1879 (38 & 39 *Vict. c.* 63), *ss.* 6, 12, 14, 20, 21, 28 (42 & 43 *Vict. c.* 30), *s.* 10—*Poor Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 106), *s.* 27—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 154.

The appellant was convicted, on the complaint of the guardians of a union, by county justices, under the Margarine Act, 1887, for selling margarine otherwise than in a package marked "Margarine," contrary to s. 6. The margarine was delivered to the purchaser in a borough which had not a separate court of quarter sessions.

Held, affirming the conviction—

That the county justices had jurisdiction;

That, the justices having found that the article sold was not a perishable article, s. 10 of the Sale of Food and Drugs Act Amendment Act, 1879, did not apply, and it was not necessary that the summons should be served within twenty-eight days from the time of the purchase;

That, the margarine not having been purchased for test purposes, or with the intention of submitting it to analysis, it was not a condition precedent to the prosecution under the Margarine Act that the notification of intention to have it analysed, prescribed by s. 14 of the Sale of Food and Drugs Act, 1875, should have been given to the appellant.

Parsons v. *Birmingham Dairy Co.* (9 Q. B. D. 172) disapproved.

Guardians of Enniskillen v. *Hilliard* (14 L. R. Ir. 214) approved.

CASE stated by justices.

On January 23, 1895, an information, dated January 18,

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1895, preferred by the respondent, clerk to the guardians of the poor of the Louth Union, for and on behalf of the guardians, against the appellant, a grocer at Louth, for that the appellant, "on the 8th day of December, 1894, at Louth, then being a person dealing in margarine by retail, did unlawfully sell margarine by retail otherwise than in a package duly branded or durably marked in the manner prescribed by s. 6 of the Margarine Act, 1887 (1), and did not deliver the same to the purchaser in or with a paper wrapper, on which was printed in capital letters, not less than $\frac{1}{4}$ inch square, 'Margarine,' contrary to the form of the statute," was heard and determined by the justices, and the appellant was convicted.

The facts which were proved at the hearing before the justices, and stated in the case, so far as the same are material to the points decided by the Court, are set out at the beginning of the judgment.

The justices were of opinion that, as justices of the peace acting in and for the Parts of Lindsey, in the county of Lincoln, they had concurrent jurisdiction with the borough justices in the borough of Louth (such borough not having a separate court of quarter sessions), that jurisdiction was given them to adjudicate in this case by s. 27 of 30 & 31 Vict. c. 106, that the Margarine Act, 1887, does not require the same steps to be taken as are required in proceedings under the Sale of Food and

(1) 50 & 51 Vict. c. 29:—

Sect. 4 imposes penalties for offences against the Act.

By s. 6, "Every person dealing in margarine in the manner described in the preceding section" (s. 4) "shall conform to the following regulations: Every package, whether open or closed, and containing margarine, shall be branded or durably marked 'Margarine' on the top, bottom, and sides, in printed capital letters, not less than three quarters of an inch square; and if such margarine be exposed for sale by retail, there shall be attached to each parcel thereof so exposed, and in such manner as to be clearly visible to the purchaser, a label marked in printed capital letters, not less than one and a half inches square, 'Margarine'; and every person selling margarine by retail, save in a package duly branded or durably marked as aforesaid, shall in every case deliver the same to the purchaser in or with a paper wrapper, on which shall be printed in capital letters, not less than a quarter of an inch square, 'Margarine.'"

The other provisions of this Act, and of the Sale of Food and Drugs Acts, 1875 and 1879, which are material are set out in the judgment.

Drugs Acts, 1875 and 1879, that butter is not "a perishable article," within the meaning of the Sale of Food and Drugs Act, that the butter (or margarine) was not purchased for "test purposes," and that s. 14 of the Sale of Food and Drugs Act, 1875, does not apply to these proceedings, for the reason that the article was not purchased "with the intention of submitting the same to analysis."

The questions for the opinion of the Court were—

1. Whether the justices had jurisdiction to hear and determine the case.

2. Whether the Margarine Act, 1887, required the same steps to be taken as are required in proceedings under the Sale of Food and Drugs Acts, 1875 and 1879.

3. Whether s. 14 of 38 & 39 Vict. c. 63, was applicable, the article not having been purchased with the intention of submitting the same to analysis.

When the case first came on for argument the authorities were found to be conflicting, and the Court therefore directed that it should be re-argued before three judges.

1895. Aug. 1. The case was re-argued before Lord Russell of Killowen C.J., Pollock B., and Wright J.

Bonsey, for the appellant. In the first place, the county justices had no jurisdiction, for the article sold was "actually delivered to the purchaser" within the borough of Louth, and therefore, by the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 20, the prosecution should have been before the borough justices.

Secondly, margarine is a perishable article, and therefore the summons ought to have been served within twenty-eight days from the time of the purchase, under the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), s. 10. The provisions of that section are imperative: *Dixon* v. *Wells*. (1) Here the sale was on December 8, and the information was dated January 18—more than twenty-eight days later.

Thirdly, the conviction is wrong because the provisions of

(1) 25 Q. B. D. 249.

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s. 14 of the Sale of Food and Drugs Act, 1875, have not been complied with. The authorities on this point are no doubt somewhat conflicting; but the more correct view is that adopted in *Parsons* v. *Birmingham Dairy Co.* (1), that compliance with s. 14 is a condition precedent. The decision in Ireland, *Guardians of Enniskillen* v. *Hilliard* (2), so far as it is in conflict with *Parsons* v. *Birmingham Dairy Co.* (1), ought not to be followed.

[He also referred to *Barnes* v. *Chipp* (3); *Rouch* v. *Hall* (4); *Harris* v. *Williams* (5); *Smart* v. *Watts.* (6)]

Stanger, Q.C., for the respondent. The justices had jurisdiction: Poor Law Amendment Act, 1867 (30 & 31 Vict. c. 106), s. 27; Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 154. They have found as a fact that margarine is not a "perishable article," and therefore s. 10 of the Act of 1879 does not apply. As to the two conflicting cases referred to, the view adopted by the Court in Ireland is right.

Bonsey, replied.

Cur. adv. vult.

Dec. 7. The following written judgment (in which Pollock B. and Wright J. concurred) was delivered by

LORD RUSSELL of KILLOWEN C.J. This is an appeal on a case stated by the magistrates of Lindsey, in the county of Lincoln, from a conviction by them, under the Margarine Act, 1887, for selling margarine otherwise than in a package marked "Margarine," as prescribed by s. 6 of that Act.

The facts were as follows:—

Upon the hearing of the information it was proved that the appellant had entered into a contract with the guardians of the poor of the Louth Union for the supply of "good fresh butter, English"; that on Saturday, December 8, 1894, the appellant, under his contract, delivered 39 lb. of butter (or margarine) at the union workhouse in Louth); that on the following Monday, December 10, 1894, the butter (or margarine) was examined by

(1) 9 Q. B. D. 172.
(2) 14 L. R. Ir. 214.
(3) 3 Ex. D. 176.
(4) 6 Q. B. D. 17.
(5) 6 Times Rep. 47.
(6) [1895] 1 Q. B. 219.

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the workhouse visiting committee, and 1 lb. of it was, on the same day, in the absence of the defendant, divided into three parts, each part being wrapped in a separate paper. One part was taken by the master of the workhouse to the appellant's shop at Louth, and, the appellant not being there at the time, the master left it with a letter, of which the following is a copy: "December 10, 1894.—At a meeting of the house committee of the Louth Union this morning the butter supplied by you was examined, and a pound of it cut into three parts; one of such parts will be sent to an analyst, one will be kept by the guardians, and the third I have been instructed to bring to you. I am, Sir, most respectfully yours, John T. Crowson, Master." The butter (or margarine) was sold by retail otherwise than in a package duly branded or durably marked in the manner prescribed by s. 6 of the Margarine Act, 1887, and the appellant did not deliver the same to the purchaser in or with a paper wrapper, on which was printed in capital letters, not less than a quarter of an inch square, "Margarine." It was also proved that by the direction of the guardians one of the sealed samples of butter (or margarine) was sent by post (registered) to Dr. Muter, public analyst for the administrative county of the Parts of Lindsey, and a certificate from him was produced, in which he stated that the sample of butter received from the guardians of the Louth Union for analysis, in his opinion, contained 75 parts of butter and 25 parts of margarine.

The first point raised by the appellant was that the justices, being county justices, had no jurisdiction to hear and determine the case, on the ground that under s. 20 of the Sale of Food and Drugs Act, 1875, the proceedings should have been commenced before the magistrates for the borough of Louth, in which was situate the workhouse "where the article sold was actually delivered to the purchaser." The section runs thus: "When the analyst, having analyzed any article, shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence, before any justices in petty sessions assembled

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having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner."

It should first of all be noticed that the section merely says "*may* take proceedings," but, further, I think that under s. 27 of 30 & 31 Vict. c. 106 (1), and s. 154 of 45 & 46 Vict. c. 50 (2), the justices clearly had jurisdiction.

The second point raised by the appellant was that margarine was a perishable article, within the meaning of s. 10 of the Sale of Food and Drugs Act Amendment Act, 1879, and that under that section the summons should have been served within twenty-eight days from the time of the purchase for test purposes. The magistrates, however, have found as facts that margarine is not a perishable article, and that the purchase was not made for test purposes.

We cannot set aside these findings, as there is no evidence before us on which we could say they were wrong. It follows that the summons need not have been served within twenty-eight days under s. 10, and no contention was made before the magistrates that it was not served within a reasonable time. It is, moreover, at least doubtful whether s. 10 of the Act of 1879 applies to proceedings under the Margarine Act.

I now come to the substantial question raised by the appellant—namely, whether compliance with s. 14 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), is necessary as a condition precedent to a prosecution under the Act.

Proceedings under the Margarine Act, 1887, are, by s. 12 of that Act, to be the same as prescribed by ss. 12 to 28 inclusive of the Sale of Food and Drugs Act, 1875. Sect. 14 of the latter Act is as follows: "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller, or his agent selling the article, his intention to have the same analyzed by the public analyst, and shall offer to divide the article into three parts, to be then and there separated, and

(1) The Poor Law Amendment Act, 1867; s. 27, deals with the jurisdiction of justices in unions.

(2) The Municipal Corporations Act, 1882; s. 154, deals with the jurisdiction of county justices in boroughs.

each part to be marked, and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent."

Now it is clear that, if that section is applicable to this case, its provisions were not complied with, and the conviction by the magistrates is wrong. But is it so applicable? I think not, for the margarine in question was not purchased by the guardians "with the intention of submitting the same to analysis." It was delivered to them, as the case states, under a contract for the regular supply to them of good fresh butter.

But the appellant's contention is that a prosecution for an offence against the Act can only be maintained where a sample has been purchased, whether by an officer under the Act or by a private individual, with a view of submitting the same to analysis. With this contention I do not agree, though it must be confessed the question is by no means free from the difficulty which constantly arises in construing many Acts of Parliament, namely, the difficulty of reconciling several different and loosely-drawn sections. I cannot think—having regard to the scope of the Margarine Act, and of the Sale of Food and Drugs Act, and to the offences set out in s. 6 of the latter and ss. 6 and 7 of the former Act—that it was the intention of the Legislature that a prosecution should be confined within such narrow limits as those contended for. For example—by s. 7 of the Margarine Act, "every person dealing with, selling, or exposing, or offering for sale, or having in his possession for the purpose of sale, any quantity of margarine contrary to the provisions of this Act, shall be liable to conviction for an offence against this Act." Could anything be wider than this? And yet can it in reason be said to be necessary that, for the purposes of a prosecution for "exposing, or offering for sale, or for having in his possession for the purpose of sale," a sample shall have been purchased for the purpose of analysis, and analyzed as described in the Act (s. 14)? (1)

The Act does not limit the initiation of a prosecution to the

(1) The Sale of Food and Drugs Act, 1875.

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purchase of a sample with a view to analysis; and, having regard to the offences the Margarine Act was aimed at, and to its preamble, I cannot think it was so intended.

The chief difficulty is raised by ss. 20 and 21 of the Sale of Food and Drugs Act, 1875, which, dealing generally with proceedings under the Act, certainly at first sight seem to imply that the formalities prescribed by s. 14 have taken place.

It seems to me, however, that the effect of s. 21 is merely to make the production of a certificate of an analysis under s. 14 of itself sufficient evidence of the facts therein stated. There is nothing in the Act to prevent the proof of an offence by other satisfactory evidence—nor is it necessary that the purchaser should obtain the certificate of the "public analyst," except where he purchases "with an intention" of submitting to analysis. Sect. 12 merely gives him *the right* on certain payments to claim an analysis from the public analyst.

Finally it may be pointed out that, by s. 28 of the Sale of Food and Drugs Act, 1875, nothing in the Act is to "take away any other remedy against any offender under this Act."

On this part of the case two decisions were cited to us—one, *Parsons* v. *Birmingham Dairy Co.* (1882) (1), in which Field and Cave JJ., not expressly, but inferentially, decided that s. 14 applies to every purchaser, whether purchasing with the intention of obtaining an analysis or not; the other, *Guardians of Enniskillen* v. *Hilliard* (1884) (2), in which Dowse B. and Andrews J. expressly dissented from that decision. I wish to say that I agree with the reasoning of the learned judges in the Irish case, and I entirely adopt the view of the Act expressed by them. It seems to me that to adopt the contention of the appellant in this case would be to largely restrict the operation of a salutary Act, and to exclude that class of cases, of which the present is an example, where there is a contract for the delivery of provisions within the Act, which may extend over a considerable period of time, and also the class of cases in which provisions are purchased from time to time in small bulk without any suspicion at the time of purchase of any deceit being practised

(1) 9 Q. B. D. 172. (2) 14 L. R. Ir. 214.

by the seller. I cannot think this is the true construction of the Act.

The appeal will, therefore, be dismissed, with costs.

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Conviction affirmed.

Solicitor for appellant: *Ernest H. Wyles, for J. Barker, Great Grimsby.*

Solicitors for respondent: *Kime & Hammond, for Wilson & Son, Louth.*

P. B. H.

SOUTTER *v.* RODERICK.

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Nov. 11, 12; *Dec.* 7.

Parliament—Registration of Voters—Description—Qualification—Amendment—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict.* c. 26), *s.* 28—*Registration Order*, 1895, *Sched. II., Part I., s.* 19, *i.* (*b*).

A person who claimed to have his name entered in the list of occupiers of a parliamentary borough inserted in his claim under the head of "Nature of Qualification" the word "dwelling-house," and under that of "Description of Qualifying Property" the words "69 Richmond Road, 3, Hamilton Square." The revising barrister amended the statement of the nature of qualification by inserting the word "successive" after the word "dwelling-house":—

Held, that, as on a reasonable construction of the claim the qualification stated must be taken to refer to successive occupation, the revising barrister had power to make the amendment.

CASE stated by the revising barrister for the borough of Southwark.

Alfred George Le Blonde claimed to have his name inserted in the list of occupiers for the Bermondsey division of the said borough. This claim was in the following form:—

Name of Claimant in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Le Blonde, Alfred George	3 Hamilton Square.	Dwelling-house.	69 Richmond Road, Stamford Hill. 3 Hamilton Square.

The appellant objected to the said claim.

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It was proved that the claimant had occupied the two dwelling-houses set out in the fourth column of the claim in immediate succession and for the qualifying period. It was contended for the appellant that the claim was defective by reason of the omission of the word "successive" in the third column. The revising barrister held that the third and fourth columns taken together shewed a qualification in respect of successive occupation, and that it was unnecessary to add the word "successive"; but that if it was necessary to make such addition he had power to make it; and he amended the claim accordingly, and inserted the claimant's name on the said list of occupiers. The objector appealed, the high bailiff of Southwark being by order of the revising barrister made respondent to the appeal.

Costelloe, for the appellant. Having regard to the terms of the Registration Order, 1895 (1), the nature of the claimant's qualification was incorrectly stated; it should have been, "dwelling-house (successive)." It was a misdescription which the barrister had no power to amend. It is settled by the cases of *Bartlett* v. *Gibbs* (2), *Foskett* v. *Kaufman* (3), and *Hurcum* v. *Hilleary* (4), that occupation of a single dwelling-house and successive occupation of different dwelling-houses are different qualifications. And in the absence of a declaration under s. 24 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), the barrister is prohibited by s. 28, sub-s. 13, of that Act from making an amendment which would have the effect of substituting one qualification for the other. In *Plant* v. *Potts* (5), where a leasehold house which would have qualified the claimant was wrongly described in the third

(1) By the Registration Order, 1895, Sched. II., Part I., s. 19 (i.), it is ordered that "In the case of occupation electors the nature of the qualification should be entered as nearly as possible in the words of the statute conferring the franchise, for instance:—

"(*b*) The nature of a household qualification should be stated thus, 'dwelling-house,' or in the case of successive occupation, 'dwelling-house (successive).'"

(2) 5 M. & G. 81.

(3) 16 Q. B. D. 279.

(4) [1894] 1 Q. B. 579.

(5) [1891] 1 Q. B. 256.

column of the claim as a freehold house, it was held that the mistake could not be amended.

R. H. Jones, for the respondent. The nature of qualification intended to be stated was that of successive occupation of dwelling-houses, and the statement in the claim may be reasonably so interpreted. The third column may be read by the light of the description in the fourth column. And the fourth column in the present case shews two dwelling-houses in succession. In *Hitchins* v. *Brown* (1), where the claimant intended to claim for successive dwelling-houses, he stated the nature of his qualification in column 3 as "house" only, and in column 4 he described the qualifying property as "5½ Muck Lane and previously of 21 Saint Mary Street," the claim was held to be amendable. That case covers the present. In *Bartlett* v. *Gibbs* (2) and *Foskett* v. *Kaufman* (3) there was only one house mentioned in column 4, and therefore there was nothing in the claim by which the word "house" in column 3 could be interpreted to mean successive dwelling-houses.

Costelloe, in reply. The case of *Hitchins* v. *Brown* (1) is distinguishable, for there the use of the word "previously" before "of 21 Saint Mary Street" shewed that the two houses were occupied in succession.

Cur. adv. vult.

1895. Dec. 7. LORD RUSSELL of KILLOWEN C.J. This was an appeal from the revising barrister of Southwark, who allowed the claim of Alfred George Le Blonde to have his name inserted in the list of occupiers for the borough. His claim was in the following form :—

Name of Claimant in full, Surname being first.	Place of Abode.	Nature of Qualification.	Description of Qualifying Property.
Le Blonde, Alfred George	3 Hamilton Square.	Dwelling-house.	69 Richmond Road, Stamford Hill. 3 Hamilton Square.

(1) 2 C. B. 25. (2) 5 M. & G. 81.

(3) 16 Q. B. D. 279.

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It was proved that the claimant had occupied the two dwelling-houses, set out in the fourth column, in immediate succession and for the qualifying period. It was objected by the appellant that the claim was invalid by reason of the omission of the word "successive" in the third column, and that the revising barrister had no power to amend the claim by inserting the word "successive," because (it was contended) it gave another and different qualification. The barrister overruled both objections, and from that decision this appeal is brought. The first question, therefore, is whether the claim as it originally stood was sufficient. The appellant contended that by reason of the instruction to overseers in the Registration Order, 1895, Sched. II., Part I., s. 19, (i.), (*b*), the qualification should have been stated as "dwelling-house (successive)." The respondent relied on the case of *Hitchins* v. *Brown* (1) as establishing the sufficiency of the claim. In that case "house" only appeared in the third column; but in the fourth column both were fully described with the word "previously" before one of them. The barrister amended the claim by inserting "houses occupied in immediate succession." The Court held on appeal that the claim was originally sufficient, but that the amendment made it more accurate. Since that case, however, was decided the Registration Order above referred to has been issued; and I think that, having regard to the instructions it contains, the qualification was not sufficiently described. The real question in the case is the second one—namely, had the barrister power to amend the statement of the qualification as he did? It was contended on behalf of the appellant that he had not, because it gave the claimant a different qualification from that stated. If that really is the result of the amendment, then the barrister clearly had not the power to make the amendment; and for authority on this point it is sufficient to refer to the cases of *Bartlett* v. *Gibbs* (2), and *Foskett* v. *Kaufman*. (3) But is that the effect of the amendment? To answer this question it is important to see what was exactly the qualification stated. It seems to me that, giving to it a reasonable

(1) 2 C. B. 25.

(2) 5 M. & G. 81.

(3) 16 Q. B. D. 279.

construction, the qualification stated must be taken to be for successive occupation. The claimant could not qualify by occupation of two houses except by reason of successive occupation; and therefore the fair interpretation of the claim seems to me to be that it is one of successive occupation. It was contended that the claim might be regarded as being for occupation of *one or other* of the two houses during the qualifying period. But even if that be so (which I do not think), then *one or other* of the two houses is surplusage, and the barrister would have power to amend by striking out one or other so as to make it clear in respect of which the qualification was claimed. The highest at which the appellant's argument can in my judgment be put is that the nature of the qualification is insufficiently stated, and in that case the barrister had power, as it seems to me, under s. 28, sub-s. 13, of 41 & 42 Vict. c. 26, to amend the description of the qualification "for the purpose of more clearly and accurately defining the same." I do not think that the case of *Foskett* v. *Kaufman* (1) assists the appellant on the point, because on the face of the claim in that case there was no ambiguity. It was a claim for occupation of one house, and it was sought to amend it into a claim for successive occupation of two houses. The case of *Hitchins* v. *Brown* (2), which I have already mentioned, closely resembles the present case, the only difference being the insertion of the word "previously" in the fourth column in the claim in the case. It was argued that this made an important difference; but I do not think so. The idea of "successive" occupation is not necessarily conveyed by the statement that another house was occupied "previously"; and it might have been argued in that case, too, that the claim was susceptible of being regarded as a claim for occupation of *one or other* of the two houses. I think that case was rightly decided; but my conclusions in this case would have been the same apart from it. I think the revising barrister ought freely to exercise the very ample powers of amendment given to him by the 28th section of the Registration Act of 1878 to correct any bonâ fide mistake made in the list or in any claim or notice of objection; and while (apart from s. 24) he cannot so alter a

(1) 16 Q. B. D. 279. (2) 2 C. B. 25.

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claim as to make the qualification a new or different one from that in the claim, he ought (following the words of s. 28, sub-s. 13) to make such change in the description of the claim as may be necessary "for the purpose of more clearly and accurately defining the same." I think the amendment made in the present case falls within that description. For the reasons I have given, I think this appeal must be dismissed with costs.

GRANTHAM J. In this case we are asked to say whether the revising barrister was right in amending a person's claim to be inserted in the list of occupiers in respect of the successive occupation of dwellings, when he omitted in such claim to add the word "successive" after the word dwelling-house, though he properly inserted the names of the houses of his successive occupation in the fourth column. In my judgment he was right in so amending. What is the nature of the qualification for which he claims? It is "occupation" as distinguished from "ownership" or any other qualification, and is still more definitely described as occupation of a dwelling-house. He has described *all* that gives him the right to vote—namely, the "occupation" of a dwelling-house and the "dwelling-house" which he occupied—first one dwelling-house and then the other during the prescribed period. By the Statutory Rules and Orders, 1895, recently published, it is apparent that it is correct to speak of the qualification derived from the successive occupation or two or more dwelling-houses as the occupation of "a dwelling-house" in the singular; and as the claimant has so claimed in the third column, and has in the fourth column correctly described the qualifying property—namely, the two houses—it seems to me that he has done all that the Act requires him to do, and that the word "successive" is really surplusage; but whether so or not, the absence of the word cannot disqualify, and, if it is necessary to be inserted to comply with the rules, then the revising barrister was justified in adding it by way of amendment for the purpose of more accurately defining it. I am aware that the Court of Appeal, in the case of *Plant* v. *Potts* (1), which was so much relied on by the

(1) [1891] 1 Q. B. 256.

appellant, did not agree with the liberal construction I put upon the amending clauses of the Registration Act (41 & 42 Vict. c. 26), s. 28, and I loyally bow to their better judgment; but though I may have given too liberal a construction of that Act to enable me in that case to give effect to the spirit of the Act, that is no reason why I should apply a still narrower construction than has yet been given to the Act to a case differing essentially from that case. Prior to *Plant* v. *Potts* (1) no one had suggested that the decision of the Court in *Hitchins* v. *Brown* (2) was incorrect; and as that case was not mentioned by the Court of Appeal, and the facts of the case are almost identical with this, and not with *Plant* v. *Potts* (1), I cannot consider the case overruled. In fact, if I am wrong in the view I have given expression to, it seems to me that the special powers of amendment given in the Registration Act of 41 & 42 Vict. c. 26, will be a dead letter. If we examine carefully the judgments of the Court of Appeal in *Plant* v. *Potts* (1), I cannot but think they distinctly exclude such a case as this from the effect of their decision. The Master of the Rolls says (3): "In other words, a revising barrister can only amend an insufficient description of the qualification, but cannot alter the description into a description of another qualification." Again, Lopes L.J. says (4): "After careful consideration, I have come to the conclusion that they empower a revising barrister *to correct an insufficient or inaccurate statement of qualification* in the third column, provided such correction does not involve a change or alteration of the qualification as it appears in the list." On the authority, therefore, of previous decisions, as well as on what I believe to be a proper construction of the Act, my judgment must be in favour of the respondent.

VAUGHAN WILLIAMS J. In this case the Lord Chief Justice and Grantham J. have arrived at the conclusion that, giving to the qualification stated a reasonable construction, it must be taken to be for successive occupation, and that it cannot

(1) [1891] 1 Q. B. 256.
(2) 2 C. B. 25.
(3) [1891] 1 Q. B. at p. 262.
(4) [1891] 1 Q. B. at p. 264.

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Vaughan Williams J.

reasonably be read as being for occupation of one or the other of the two houses. I am not at all sure myself that many a reasonable man would not read this qualification as being a qualification by occupation of a dwelling-house at 69, Richmond Road, Stamford Hill, by a person occupying at the date of the claim 3, Hamilton Square. I cannot but think that if the evidence had shewn a qualification by reason of occupation of 69, Richmond Road, and no sufficient successive occupation of the two houses mentioned to give a qualification in respect of successive occupation, the statement of the qualification would have been properly argued to have been a reasonably clear statement of a qualification by occupation of a single dwelling-house. If so, the qualification as stated might reasonably be read as referring to either one of two different qualifications. If so, I doubt the power of the revising barrister to amend. He would in such case, by amending, not merely be more clearly and accurately defining the qualification stated; he would by the amendment exclude from the statement one of the qualifications possibly included, and therefore would be altering the description of the qualification; while the equivocal claim capable of meaning either one of two qualifications would have been unfair to the objector, as throwing on him the necessity of making two sets of inquiries. Fairness to the objector seems to be a matter which should be taken into consideration: see the judgment of Lord Esher in *Dashwood* v. *Ayles*. (1) If the claim could equally well describe either franchise I should say it ought not to be amended. But inasmuch as both the Lord Chief Justice and Grantham J. think the qualification stated, reasonably read, means "successive occupation," and not a claim for occupation of one dwelling-house for the requisite period, I am not prepared to differ as to the construction of this particular claim, which is not a matter of principle or of any importance except to this particular claimant and objector; but I wish to record my dissent from the proposition that where the description of the claim is equally applicable to one qualification as to another the revising

(1) 16 Q. B. D. 295, at p. 298.

barrister has power to amend, or ought to amend. Subject to these observations, I concur in the result and judgment.

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Appeal dismissed.

Solicitor for appellant: *C. Hubbard.*
Solicitor for respondent: *Roderick.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A. 1895 *Nov.* 29.

In re CORNISH. *Ex parte* BOARD OF TRADE.

Bankruptcy—Trustee—Unclaimed or undistributed Funds—Liability to account—Board of Trade—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 162—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *ss.* 1, 8.

By s. 162, sub-s. 2 (*a*), of the Bankruptcy Act, 1883, where, after the passing of the Act, any unclaimed or undistributed funds or dividends in the hands of any trustee empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule, or any petition, resolution, deed, or other proceeding under or in pursuance of such Act, have remained or remain unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee, it shall be the duty of such trustee forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. (*b*) The Board of Trade may at any time order "such trustee" to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding:—

Held, that the Board of Trade were entitled to enforce an order for an account against a trustee under this section without proving that he had had in his hands, after the passing of the Act, any unclaimed or undistributed funds or dividends.

Decision of Queen's Bench Division ([1895] 2 Q. B. 634) affirmed.

Sect. 8 of the Trustee Act, 1888, does not apply to a trustee in bankruptcy.

APPEAL by Edwin Fewings, the trustee in the liquidation of F. F. R. Cornish, against an order of a Divisional Court (Vaughan Williams and Kennedy JJ.) (1), that the appellant should comply with an order of the Board of Trade, dated January 18, 1895, that he should submit to the Board an account, verified by affidavit, of the sums received and paid by

(1) [1895] 2 Q. B. 634.

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him as trustee under or in pursuance of the liquidation proceedings.

On February 10, 1875, Cornish filed a liquidation petition under the Bankruptcy Act, 1869, in the Exeter County Court; and on March 9, 1875, Fewings was appointed trustee. He had never been released by the creditors, and the liquidation had not been closed. No dividend had been paid to the creditors. Fewings failed to comply with the order of the Board of Trade; and the Board applied to the Exeter County Court to enforce compliance with it. There was no evidence that, since the passing of the Bankruptcy Act, 1883, Fewings had had in his hands any funds which he was bound to pay into the Bank of England.

The judge of the county court thought that under these circumstances he was bound by the judgment of Cave J. in *In re Chudley* (1) to refuse the application, though he said that, but for that judgment, he should have granted it.

The Board of Trade appealed, and the Divisional Court reversed the decision and made the above-mentioned order, but gave leave to the trustee to appeal.

Herbert Reed, Q.C., and *Ward Coldridge*, for the appellant. Under s. 162 (2) of the Bankruptcy Act, 1883, the Board of

(1) 14 Q. B. D. 402.

(2) By s. 162, sub-s. 2 (*a*), "Where, after the passing of this Act, any unclaimed or undistributed funds or dividends in the hands or under the control of any trustee or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule, or any petition, resolution, deed, or other proceeding under or in pursuance of any such Act, have remained or remain unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee or other person, it shall be the duty of such trustee or other person forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. The Board of Trade shall furnish such trustee or other person with a certificate of receipt of the money so paid, which shall be an effectual discharge to him in respect thereof."

[The Bankruptcy Act, 1869, is one of the Acts mentioned in the 4th schedule.]

"(*b*) The Board of Trade may at any time order any such trustee or other person to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding as aforesaid, and may direct and enforce an audit of the account."

Trade are not authorized to order a trustee under such circumstances as these to submit to them an account. "Such trustee" in sub-s. (*b*) means a trustee in whose hands there have been since the passing of the Bankruptcy Act, 1883, unclaimed or undistributed funds or dividends: *In re Chudley*. (1) Here the Board of Trade have adduced no evidence that this condition precedent to their right to order the account has been fulfilled.

[LORD ESHER M.R. In that case the trustee had obtained a release.]

But the ground of the decision was that the trustee had had money in his hands.

Again, the lapse of time is a bar to the right to call for an account: Trustee Act, 1888, s. 8.

[LORD ESHER M.R. Does that Act apply to a trustee in bankruptcy, who is subject to the specific enactments of the Bankruptcy Act?

KAY L.J. The trustee is an officer of the Court.]

He was appointed by the creditors, not by the Court. The words of the Act of 1888 are very general. *In re Page* (2) shews the application of the Act.

Sir R. B. Finlay, *S.-G.*, and *Muir Mackenzie*, for the Board of Trade, were not called upon.

LORD ESHER M.R. The question only is, whether, under s. 162, sub-s. 2 (*b*), the Board of Trade had a right to call upon this trustee to render them an account. It was argued that the expression "such trustee" is confined to a particular kind of trustee—namely, one who has had money in his hands. The Divisional Court have held that those words refer to a trustee or any other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the schedule of the Act, and I entirely agree with them. If that be so, sub-s. 2 (*b*) applies to this trustee.

It is said it only applies to this trustee if the Board of Trade have fulfilled a condition precedent—that before they can have

(1) 14 Q. B. D. 402. (2) [1893] 1 Ch. 304.

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any right to ask him to give an account they must shew that he has had money in his hands which he has not distributed. Sub-s. 2 (*b*) says that the Board of Trade "may at any time order any such trustee or other person to submit to them an account." There is no condition expressed there, but we are asked to imply one. It seems to me that to imply such a condition as has been suggested would tend to upset the provisions of the Act, and to leave accountants who are trustees to do just what they please. Therefore, on the first point I agree with the learned judge. He said: "It has been argued that the words 'such trustee' in clause (*b*) must be read as meaning a trustee who, after the passing of the Act, is a trustee having funds in his hands which he is bound to pay into the Bank of England. I do not agree with that argument. I think the words 'such trustee' in clause (*b*) mean a trustee appointed under any of the scheduled Acts." I agree with the learned judge; and therefore that ground of the appeal fails.

Then we come to the Trustee Act, 1888. Upon that the learned judge said: "The object of clause (*b*) in the Act of 1883 is to make [the trustee] furnish such a statement as will enable it to be determined whether he is or is not an accountable party. When he has furnished the account, it may be or it may not be that any claim against him to a balance of account is barred by a statute of limitations." Therefore the learned judge left that question open. But the point has been pressed upon us, and I am prepared to decide it now. In my opinion the Trustee Act, when it speaks of trustees in general, has no application to a trustee in bankruptcy. And even if it does apply, it can only do so when a claim is made upon the trustee for the payment of money; and no claim has as yet been made upon the appellant, except that he should give this account for the purpose of shewing whether any further claim can be made upon him.

On both grounds, therefore, I think that the order of the Court below was right, and that the appeal must be dismissed.

LOPES L.J. I think this is a very clear case. I will add nothing to what has been said by the Master of the Rolls,

except that I agree with him that the Trustee Act does not apply to such a trustee as this.

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KAY L.J. I agree that this appeal must be dismissed. With regard to the construction of the Act, I will only add this. Sub-s. 2 (*b*) of s. 162 of the Bankruptcy Act, 1883, says that "the Board of Trade may at any time order any *such* trustee or other person to submit to them an account." The words "such trustee or other person" are relative words. To what do they refer? Clearly to sub-s. (*a*) of the same section, which speaks of "any trustee or other person empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule, or any petition, resolution, deed, or other proceeding under or in pursuance of any such Act." That is the description of the trustee to which the words "such trustee" refer. The other words which are relied on by the appellant form no part of the description of the "trustee or other person." Sub-s. (*a*) provides that where any trustee or other person, &c., after the passing of the Act has any unclaimed or undistributed funds in his hands, he is to pay them into the Bank of England; but the having unclaimed or undistributed funds in his hands is no part of the description of the trustee or other person. It would be nonsense if we were to introduce that as part of the description of the "trustee or other person," and it would limit the operation of sub-s. (*b*) in a most extraordinary manner. It has been seriously argued that the Board of Trade cannot call upon any trustee or other person mentioned in sub-s. (*b*) to account, unless they first shew that, since the passing of the Act, he has had funds in his hands, and that he may say, "I have not had any funds in my hands since the passing of the Act, and therefore I am not liable to account." I think the learned judge was perfectly right in holding that that is not the true construction of sub-s. (*b*). It gives to the Board of Trade a large power of calling upon trustees to account, and there is no reason for limiting it in the way suggested. It is a power for the Board of Trade to call upon trustees in a bankruptcy or liquidation to account to them; and if a trustee refuses or

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hesitates to do so the Board can obtain an order from the Court of Bankruptcy to enforce their direction. The provision is for the accounting of an officer of the Court of Bankruptcy to the Court, or rather to the Board of Trade, who have now a statutory right to interfere in bankruptcy matters.

The other point taken was that s. 8 of the Trustee Act, 1888, applies to the case. In my opinion s. 8, which limits the time for making claims upon trustees, has nothing to do with an officer of the Court who is required by the Court to account. If it had, it would equally apply to a receiver and to other officers of the Court who have been put by the Court in possession of property, and are required to account to the Court. I have never yet heard it suggested that s. 8 of the Trustee Act applied to such cases as that. Moreover, if it did apply, it would not apply to the present case, because if upon taking the account it should appear that the trustee has money in his hands which he has not properly applied, he would come within the exception in s. 8 of the Act, and the limitation of the liability of a trustee would not apply to him at all. I think that this point also fails, and that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Colyer & Colyer; Solicitor to Board of Trade.*

W. L. C.

WOODSIDE *v.* GLOBE MARINE INSURANCE COMPANY, LIMITED.

1895
Dec. 4, 9.

Insurance (Marine)—Insurance against Fire—Ship Stranded and Depreciated in Value—Subsequent Destruction by Fire.

The plaintiffs' vessel was insured by the defendants by a valued time policy against loss or damage by fire. While so insured she stranded, and sustained such injuries that the cost of repairing her would have been greater than her value when repaired. Thirty-six hours afterwards she was completely destroyed by fire.

In an action by the plaintiffs on the policy:—

Held, that the defendants were liable for the full amount for which they had insured the vessel.

ACTION tried without a jury before Mathew J. in the Commercial Court.

The plaintiffs were the owners of the steamship *Bawnmore*, which was insured with the defendants against loss or damage by fire or explosion by a time policy in which the vessel was valued at 20,000*l*. The *Bawnmore* was also insured by ordinary marine policies against loss arising from perils of the sea.

While so insured the *Bawnmore*, on August 28, 1895, was stranded on the coast of Oregon, U.S.A., and received very considerable injuries. Thirty-six hours later she was completely destroyed by fire.

The present action was then brought claiming against the defendants for a total loss by the perils insured against. On an application in chambers, it was ordered that the liability of the defendants should be argued as a preliminary point of law on the assumption that the *Bawnmore*, at the time the fire broke out, was still a ship capable of being floated and repaired although at an expense exceeding her repaired value.

The question now came on for argument.

Bigham, *Q.C.*, and *Leck*, for the plaintiffs. The defendants are liable. Their liability is not affected by the fact that the vessel was insured against perils of the sea, and was stranded in consequence of such perils. As regards the perils insured

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against by this policy, they were wholly uninsured. The value inserted in the policy is conclusive between the parties, although it may be in excess of the true value: *Barker* v. *Janson*. (1) The plaintiffs are therefore entitled to recover from the defendants the full amount insured: *Lidgett* v. *Secretan*. (2) [They also referred to *Potter* v. *Campbell* (3); *Ionides* v. *Universal Marine Insurance Co.* (4)]

Joseph Walton, Q.C., and *J. A. Hamilton*, for the defendants. The facts in *Barker* v. *Janson* (1) and *Lidgett* v. *Secretan* (2) were entirely different from those in the present case. When the *Bawnmore* stranded she became a constructive total loss by perils of the sea against which she was insured. The plaintiffs cannot be allowed to recover twice over in respect of a total loss. If the fire had occurred first and had occasioned a partial loss, and then the vessel had been totally lost by perils of the sea, the plaintiffs could not recover anything under the fire policy. This was decided in *Livie* v. *Janson* (5), which is precisely in point.

Bigham, Q.C., replied.

Cur. adv. vult.

Dec. 9. MATHEW J. This is an action to recover a total loss upon a time policy of marine insurance on the steamship *Bawnmore*, valued at 20,000*l.*, against loss or damage by fire or explosion only.

The vessel, by perils of the sea, was driven ashore on the coast of Oregon, and while stranded she was totally destroyed by fire. The defendants denied their liability on the ground that at the time of the fire the ship was already a constructive total loss. The plaintiffs, on the other hand, contended that even upon the assumption that there had been a constructive total loss of the *Bawnmore* when stranded (which was not admitted), the assured, as a matter of law, were entitled to recover. It was ordered that the question should be argued as a preliminary point of law on the assumption that the vessel

(1) L. R. 3 C. P. 303.
(2) L. R. 6 C. P. 616.
(3) 16 W. R. 399.
(4) 14 C. B. (N.S.) 259.
(5) 12 East, 648.

when stranded was still a ship capable of being floated and repaired, although at an expense exceeding her repaired value. Upon the argument it was agreed by both sides that the case must be dealt with as if the owners were uninsured against the perils of the seas which caused the stranding. For the plaintiffs, reliance was placed upon the decision in *Barker* v. *Janson* (1) and *Lidgett* v. *Secretan*. (2) The ship, it was said, though seriously damaged by the stranding, was still a ship capable of being repaired, and the valuation in the policy was binding notwithstanding the depreciation in her value due to her having been driven ashore. For the defendants it was argued that if the fire had occurred first, and the damage had not been repaired, the underwriters would not have been liable. The damage by fire, it was said, was, as it were, merged in the previous total loss. The assured must be treated as if they had been indemnified and had received the value of their ship, and they ought not to be permitted to recover twice over for what was one loss.

I am of opinion that the plaintiffs are entitled to judgment. The loss by stranding would only become total if the assured gave timely notice of abandonment. If none were given, the loss would be a particular average, and it would seem clear law that a particular average loss, however serious, could not impair the right of the assured to recover for a subsequent total loss upon the basis of the valuation. Whether the subject-matter of insurance be ship or goods, the valuation is the amount fixed by agreement at which in case of loss the indemnity is to be calculated. Where goods are assured the valuation may be low when the policy attaches; but the value to the owner may be enhanced when the goods have nearly reached their destination by the expenses of transit, &c. Yet the valuation is binding. And, again, if the valuation be high, but the goods are depreciated in value from fall of market or other causes for which the underwriter is not liable, the valuation cannot be opened.

In the case of a ship, in the same way, the vessel may from many causes be worth much less at the time of loss than the agreed value; but the valuation determines the amount of the

(1) L. R. 3 C. P. 303. (2) L. R. 6 C. P. 616.

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underwriters' liability. This has been clearly the law since the case of *Shawe* v. *Felton*. (1)

I am unable to distinguish such a loss as the present from any other in which, while the subject-matter of insurance still exists and there is no suggestion of fraud, a diminution in its value is relied upon to exonerate the underwriter from the whole or from part of his liability. It is impossible, as Lord Kenyon said (2), to draw the line between a greater or less diminution of value. I therefore give judgment for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Lowless & Co.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

A. P. P. K.

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Dec. 21.

In re ARTON.

Criminal Law—Extradition—Jurisdiction—Bona fides of Demand for Surrender—Offence of a Political Character—Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 3, *sub-s.* 1.

Where the surrender of a fugitive criminal is demanded by the Government of a friendly State for offences within the provisions of the Extradition Act, 1870, and of the extradition treaty with that State, the Court has no jurisdiction to inquire whether the demand for surrender is made in good faith and in the interests of justice.

The provision of s. 3, sub-s. 1, of the Extradition Act, 1870, by which a fugitive criminal shall not be surrendered if he proves to the satisfaction of the Court that the requisition for his surrender has been made with a view to try or punish him for an offence of a political character, applies only to an offence of a political character which has been already committed.

APPLICATION for habeas corpus.

The motion was made on behalf of Emile Arton for an order nisi calling upon the Secretary of State for the Home Department, Sir John Bridge, the chief magistrate of the metropolis, and the Government of the French Republic, to shew cause why a writ of habeas corpus should not issue, directed to the governor of Holloway Prison, commanding him to bring the body of Arton into court to abide the judgment of the Court.

(1) 2 East, 109. (2) 2 East, at p. 115.

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The prisoner had been arrested in England and brought before the chief magistrate at the Bow Street Police Court, and by him committed to prison for the purpose of extradition. The offences in respect of which the order of committal was made were six in number: (1.) falsification of accounts and using falsified accounts; (2.) fraud by an agent, trustee, director, and public officer of a company; (3.) obtaining money and goods by false pretences; (4.) offences against the bankruptcy laws; (5.) larceny, and (6.) embezzlement. The motion was made upon the four following grounds: (1.) That the prisoner had been committed for offences not within the extradition treaty between England and France: this objection applied only to the charges of falsification of accounts and using falsified accounts. (2.) That he had been committed for offences of which no primâ facie proof was disclosed by the depositions. This objection applied to the charges of fraud by an agent, &c., and of obtaining money and goods by false pretences; but as it was admitted that the depositions contained sufficient primâ facie proof of the charges for offences against the bankruptcy law, larceny, and embezzlement to justify a committal in respect of those offences, this ground was abandoned without argument. (3.) That the demand for extradition was not made in good faith and in the interests of justice. (4.) That the offences imputed were all of them political in their character, and that the surrender was demanded from exclusively political motives.

C. W. Mathews, for the prisoner. As to the first point: falsification of accounts is not included in the offences enumerated in art. 3 of the extradition treaty with France, or in the 1st schedule to the Extradition Act, 1870. In the order of committal the offence is described by its French name, "faux," which is improperly translated as falsification of accounts and using falsified accounts; it really means "forgery," and in respect of the charges of forgery against the prisoner the learned magistrate refused to commit. The 18th clause of art. 3 (1)

(1) Art. 3, clause 18, of the treaty with France is as follows: "Fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company, made criminal by any Act for the time being in force." The language of the 1st schedule to the Extradition Act, 1870 (33 & 34 Vict. c. 52), is identical.

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of the treaty deals with fraud by bailees and persons in other named capacities; but that does not cover falsification of accounts, which was made a crime in this country long after fraud by bailees, &c., had been declared to be criminal. There is nothing to connect the falsification with a person acting in any of those capacities. The committal is also made in respect of a charge of fraud by a bailee eo nomine; so that, assuming that the falsification of accounts could have been made in the character of a bailee so as to come within the 18th clause, it is clearly to be inferred in the present case that it was not so made, but that the charge is a wholly distinct one of the crime of falsification of accounts as known to our law, for which no provision is made by the Extradition Act or treaty.

As to the fourth point (1), admitting that the offences in respect of which extradition is demanded are not in themselves offences of a political character, the facts shew that the extradition of the prisoner is demanded in order to try or punish him for an offence of a political character. (2) The case is in many respects similar to that of *In re Castioni* (3), where, the extradition of the prisoner being demanded on a charge of murder, he was held to be entitled to be discharged from custody on its being shewn from the facts that the act was committed during a revolutionary disturbance of a political character. In the present case the facts contained in the affidavits will shew the object with which the demand for surrender is made.

[LORD RUSSELL of KILLOWEN C.J. The Court cannot permit you to argue the point that a friendly State is not acting in good faith in making this application: that is not a question which the judicial authorities of this country have any

(1) The second point was abandoned, and the learned counsel was directed by the Court to argue the fourth point before the third.

(2) By 33 & 34 Vict. c. 52 (The Extradition Act, 1870), s. 3, "The following restrictions shall be observed with respect to the surrender of fugitive criminals:—

"(1.) A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is one of a political character, or if he prove to the satisfaction of the police magistrate or the Court before whom he is brought on habeas corpus, or to the Secretary of State, that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character."

(3) [1891] 1 Q. B. 149.

power to entertain. What is the offence of a political character for which you suggest that the prisoner will be punished?]

Refusing to disclose political secrets to the French government. Under the French judicial system the tribunal which tries him will interrogate him as to these secrets, and, whatever may be the technical description of the offence for which he is extradited and put upon his trial, his punishment will depend upon his disclosure or non-disclosure of these political secrets.

[WILLS J. How is that an offence? "Offence" must mean something which is definitely brought within the criminal law of France.]

It may be admitted that it is impossible to describe the offence in a word or in technical language; but it is conduct for which the prisoner will be punished.

[LORD RUSSELL of KILLOWEN C.J. The statute clearly contemplates that a political offence has been already committed, and that under cover of trying the accused for a crime the foreign tribunal will punish him for that past political offence; but your suggestion in the present case is pure speculation.]

The facts would shew that the prisoner had already in 1892 and 1893 refused to disclose political secrets to the French Government.

LORD RUSSELL of KILLOWEN C.J. It is not necessary for us in the present case to consider the general law of extradition, except for the purpose of pointing out the distinction between its political and its strictly judicial aspect, with the latter of which alone we have to deal. The law of extradition is, without doubt, founded upon the broad principle that it is to the interest of civilized communities that crimes, acknowledged to be such, should not go unpunished, and it is part of the comity of nations that one state should afford to another every assistance towards bringing persons guilty of such crimes to justice. But in the application of this principle certain matters, such as the conditions upon which, and the class of crimes in respect of which, extradition is to be granted, and the formalities to be observed upon an application for extradition, are primarily matters for the two political powers concerned to arrange in the

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first instance by treaty; having arranged them by treaty, the next step is by legislative enactment to give them the force of law, and to express in an Act of Parliament the conditions and limitations imposed upon the grant of extradition and the class of crimes to which extradition is to apply. It is to the expression of the Legislature in Acts of Parliament, and to that alone, that judicial tribunals can refer. As I have already said in the course of the argument, Acts of Parliament are the sole source, and at the same time the strict limitation, of the judicial functions. We are sitting here as judges only, and have nothing to do with political considerations, except so far as they may have been introduced into the language of the Acts which we are called upon to construe.

The grounds on which the present motion is made are four in number. The first point made is that the person in custody has been committed in respect of crimes which are not within the extradition treaty: this applies to one out of six charges in respect of which the order of committal was made—the offence described as "faux," or falsification of accounts, and the using of falsified accounts. It has been argued before us that this is not within the enumeration of offences described in the treaty; and there is no doubt that in order to justify a committal the offence for which the accused is committed must come within the language both of the treaty and of the Extradition Act. The only category in art. 3 of the treaty which has any application to the case is the eighteenth, which speaks of "fraud by a bailee, banker, agent, factor, trustee, or director, or member, or public officer of any company, made criminal by any Act for the time being in force." The point is this: that in the order of committal the charge is described simpliciter as falsification of accounts and using falsified accounts, while the accused is not charged with such falsification in the character of bailee, banker, agent, factor, trustee, or director, or member, or public officer of a company, within the meaning of the 18th category of art. 3 of the treaty. The point taken on behalf of the prisoner is said to be strengthened by the fact that in the same order of committal in which he is charged with the offence of "faux" there is a distinct and separate charge which is within the

express terms of the 18th category. It is argued, therefore, with some show of reason, that this may be construed as a charge of fraud other than a fraud in any one of the characters mentioned in category 18 of art. 3. I think that sufficient has been advanced by the learned counsel to justify us in granting a rule upon that ground; and if, when the rule comes on for argument, those who represent the Crown are unable to satisfy the Court that the charge has been properly included in the order for committal, steps will be taken to prevent the prisoner being charged with that offence.

The second point taken is that there has been a committal for offences in respect of which there was no primâ facie proof before the learned magistrate; and the learned counsel is quite right in saying that the Court is entitled, and is indeed bound, to see whether there has been made out such a primâ facie case of guilt as would entitle a magistrate to commit in the ordinary case of an offence against the municipal law of this country. The allegation of the want of sufficient proof is restricted to two charges out of six—that of fraud by an agent (which comes within the 18th category of art. 3, to which I have already alluded), and that of obtaining money and goods by false pretences; but it is admitted that both these charges are within the treaty and the Extradition Act, and that extradition may be granted in respect of them. It is also properly and candidly conceded that in respect of the remaining charges, offences against the bankruptcy law, larceny, and embezzlement, it could not be successfully contended that there was not sufficient primâ facie evidence to justify a committal. In view of that admission, the learned counsel has not thought it right to insist upon this point.

The third ground urged was that the demand for extradition was not made in good faith and in the interests of justice. I pass this by for the moment, and come to the fourth ground, which we directed the learned counsel to argue before the third—namely, that the offences for which the prisoner was committed were political in their character, and that his surrender was demanded from political motives. No doubt if the learned counsel were able to shew that the surrender was demanded for

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an offence of a political character, or that it was demanded in order that the prisoner might be tried or punished for an offence of a political character, it would furnish ground for the intervention of this Court, and for a declaration by this Court that for such an offence extradition could not legally be granted. Let us consider whether there is any real ground for either of the suggestions made. First, is this offence, or is any of the offences in respect of which the order of committal was made, one of a political character? The bare enumeration of them seems to afford a sufficient answer to that suggestion: they are falsification of accounts and using falsified accounts, fraud by an agent, fraud by a trustee, fraud by a director of a company and by a public officer; obtaining money and goods by false pretences, offences against the bankruptcy laws, larceny, and embezzlement. The mere enumeration of these offences shews that they are completely divested of any trace of a political character. Then, can it be said that the application for extradition has been made with a view to try or punish the prisoner for an offence of a political character? It is clear what this suggestion means: it means that a person having committed an offence of a political character, another and wholly different charge (which does come within both the Extradition Act and the treaty) is resorted to as a pretence and excuse for demanding his extradition in order that he may be tried and punished for the offence of a political character which he has already committed. In the present case we have not been told, although we have pressed for the information, what is the offence of a political character which it can be alleged that the accused has committed; the answer to our inquiries has been that it is impossible to give it a name or to describe it. As to that fourth point, therefore, I am of opinion that we have no evidence before us to warrant our coming to the conclusion either that the offence in respect of which extradition is demanded is one of a political character, or that the requisition for extradition is made with a view to punish the prisoner for such an offence.

I come now to the third, and last, ground upon which this rule has been moved—that the demand for extradition is not made in good faith and in the interests of justice. It has been

pointed out by myself and my learned brothers during the argument that this is in itself a very grave and serious statement to put forward, and one which ought not to be put forward except upon very strong grounds; it conveys a reflection of the gravest possible kind, not only upon the motive and actions of the responsible Government, but also impliedly upon the judicial authorities of a neighbouring and friendly Power. Is it open to us at all to consider such a suggestion? In my judgment, it is not, and I have already stated the grounds for my opinion. This question bears on the political aspect of extradition, and it must be determined upon a consideration of matters into which this Court is not competent and has no authority to enter. Such considerations, if they exist at all, must be addressed to the executive of this country; they cannot enter, and ought not to enter, into the judicial consideration of this question, which in this case turns solely upon the construction of the Extradition Act and the treaty. There will, therefore, be no rule except upon the first ground.

WILLS J. I am entirely of the same opinion, and I desire to add a few words upon one point only—that is, that the application for extradition is made with a view to try or punish the accused for an offence of a political character. In my judgment, it is impossible to doubt, applying the ordinary principles of construction, that the offence of a political character of which the Act speaks must be one which has been already committed. It is admitted by the learned counsel that he cannot suggest any conduct of the prisoner which can properly be so described; but he contends that, if upon sufficient evidence the prisoner is properly extradited in respect of the crimes charged against him, the consequence will be that when he gets into the hands of the French judicial authorities he will be compelled either to disclose other matters which he knows, and which it is said other people are interested in knowing also, or in default of disclosure to undergo an indefinite period of imprisonment, as I understand the suggestion, until he satisfactorily answers their questions. I can only say that the same considerations must enter into this question that

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have led us to the conclusion that we cannot enter into the question of whether the action of the executive of a foreign country at peace with us is honest or dishonest; we must assume that the French Courts will administer justice in accordance with their own law; and so long as they do that, or whether they do it or not, we cannot interfere beforehand to prevent them from exercising in this particular case the procedure which they exercise with regard to any criminals who may be brought within their jurisdiction. In the present case the prisoner either will or will not comply with the requirements of the French law, whatever they may be; if he complies, he will have committed no offence for which he can be either tried or punished; if he does not, he must take the consequences of his refusal. It seems to me that that is an absolute and complete answer to the argument on that head.

WRIGHT J. I am of the same opinion.

Rule nisi on first ground only.

Solicitors for defendant: *Arthur Newton & Co.*

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[IN THE COURT OF APPEAL.]

DUNN *v.* THE QUEEN.

Crown, Prerogative of—Civil Service—Tenure of Office—Power of Dismissal at Pleasure.

Servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown.

APPLICATION for judgment or a new trial, on the ground of misdirection, in a petition of right tried before Day J., with a jury.

The case set up by the suppliant was that Sir Claude McDonald, Her Majesty's Commissioner and Consul-General for the Niger Protectorate in Africa, acting on behalf of the Crown, had engaged him in the service of the Crown as con-

sular agent in that region for a period of three years certain, and he claimed damages for having been dismissed before the expiration of that period. It appeared that Sir Claude McDonald himself held office only during the pleasure of the Crown. The learned judge held that contracts for the service of the Crown were determinable at the pleasure of the Crown, and therefore directed a verdict and judgment for the Crown.

W. H. Stevenson, for the suppliant. It has no doubt been held that in the case of military service the Crown has a right of dismissal at pleasure: *In re Tufnell* (1); *Grant* v. *Secretary of State for India*. (2) But that right is founded upon considerations peculiar to military service, and the civil service of the Crown stands on a different footing. Where a civil servant has been employed for a certain period, it cannot be against public policy that the Crown should compensate him, if it thinks fit to terminate the service before the expiration of that period. [He also cited *Shenton* v. *Smith* (3); *Thomas* v. *Reg.* (4); *Cooper* v. *Reg.* (5) *Mitchell* v. *Reg.* (6)]

Sir R. B. Finlay, S.-G., and *H. Sutton*, for the Crown. It is contended that servants of the Crown hold office only during the pleasure of the Crown, except in cases where it is otherwise provided by statute. The same considerations apply to the civil service of the Crown as to its military service. The action of a civil servant of the Crown might, if he could not be dismissed, in some cases bring about a war. A contract to employ a servant of the Crown for a fixed period would be against the public interest and unconstitutional. It is not competent for the Crown to tie its hands by such a contract. In the case of *De Dohsé* v. *Reg.* (7), decided by this Court and afterwards by the House of Lords, the question as actually raised by the facts related no doubt to military service; but the

(1) 3 Ch. D. 164.
(2) 2 C. P. D. 445.
(3) [1895] A. C. 229.
(4) L. R. 10 Q. B. 31.
(5) 14 Ch. D. 311.
(6) See note at the end of this case.
(7) Not reported. Decided in Court of Appeal, June 2, 1885, by Brett M.R., Baggallay L.J., and Bowen L.J.; in the House of Lords, Nov. 25, 1886, by Lord Halsbury L.C. and Lords Blackburn, Watson, and FitzGerald.

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doctrine on the subject seems to have been laid down in general terms, and to be as much applicable to the civil service of the Crown as to its military service.

W. H. Stevenson, in reply.

LORD ESHER M.R. In this case the petitioner was employed as a civil servant of the Crown in the public service at a certain salary, and the question has arisen with relation to his service which, in the case of *De Dohsé* v. *Reg.* (1), I foresaw might arise, and with respect to which I then indicated what would probably be my view when it did arise. I said, in giving judgment in that case: "It is said that it was lawful to make such an engagement with him (the suppliant) for seven years, because the engagement offered and proposed was not an engagement of military service, it being admitted in argument that, if the engagement was for military service as a soldier, whether as officer or private, it is contrary to public policy that any such contract should be made. Now, whether that doctrine with regard to the Crown is confined to military service or not need not be decided to-day, but I do not at all accept the suggestion that it is so confined. All service under the Crown itself is public service, and to my mind it is most likely that the doctrine which is said to be confined to military service applies to all public service under the Crown, because all public service under the Crown is for the public benefit." That case came before the House of Lords; and it seems to me that Lord Watson in his judgment almost in terms decides that what I thought would probably turn out to be the right view on the subject is correct. He says: "In the first place it appears to me that no concluded contract is disclosed in the statements contained in this petition of right; and in the second place I am of opinion that such a concluded contract, if it had been made, must have been held to have imported into it the condition that the Crown has the power to dismiss. Further, I am of opinion that, if any authority representing the Crown were to exclude such a power by express stipulation, that would be a violation of the

(1) See note (7) ante, p. 117.

public policy of the country and could not derogate from the power of the Crown." Anything more distinct and general than that there could not be. It seems to me that the rule, as laid down by the House of Lords, is in consonance with what I suggested to be the true rule in the Court of Appeal. The case of *Shenton* v. *Smith* (1) appears to me to be really equally conclusive of the matter. Though I think the rule is hardly as clearly laid down in that case as in the House of Lords, one cannot read the judgment of the Privy Council without seeing that they meant to express the same doctrine. It seems to me that both on authority and on principle it is clear that the petitioner is not entitled to succeed. Therefore, this application must be dismissed.

LORD HERSCHELL. I am of the same opinion. The petitioner was appointed by Sir Claude McDonald consular agent for the Niger Protectorate, and as such he was the servant of the Crown, representing the Crown for certain purposes. The question is whether the Crown was entitled to dismiss the petitioner. His case is that, he being engaged for a period of three years, the Crown had no right to put an end to his engagement as it did, and he is therefore entitled to damages. I take it that persons employed as the petitioner was in the service of the Crown, except in cases where there is some statutory provision for a higher tenure of office, are ordinarily engaged on the understanding that they hold their employment at the pleasure of the Crown. So I think that there must be imported into the contract for the employment of the petitioner the term which is applicable to civil servants in general, namely, that the Crown may put an end to the employment at its pleasure. In this case there is not a tittle of evidence that, supposing it were possible, Sir Claude McDonald had any authority to employ the petitioner on any other terms than those which are applicable to the civil service generally. It seems to me that it is the public interest which has led to the term which I have mentioned being imported into contracts for employment in the service of the

(1) [1895] A. C. 229.

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Crown. The cases cited shew that, such employment being for the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the Crown, except in certain exceptional cases where it has been deemed to be more for the public good that some restriction should be imposed on the power of the Crown to dismiss its servants.

KAY L.J. I will assume for the purposes of this case that the petitioner was definitely engaged by Sir Claude McDonald in the service of the Crown at a certain salary for the term of three years. The question is whether that engagement prevented the Crown from exercising its ordinary right of dismissal. I was much impressed by the consideration that Sir Claude McDonald's own appointment was only during the pleasure of the Crown, and it would be a strange thing, that being so, that he should have power to bind the Crown by an appointment of a subordinate servant for three years, during which the Crown would have no power to dismiss that servant. I think that a general principle has been established by the cases on the subject. Some of those were no doubt cases of military service. It was argued that in such cases other considerations applied, and that it was essential for the advantage of the State that the Crown should have the right of dismissal at pleasure, but that the same considerations did not apply to the civil service. I do not concur in that view. It seems to me that the continued employment of a civil servant might in many cases be as detrimental to the interests of the State as the continued employment of a military officer. It is impossible not to see that in remote places on the frontiers of our territory the question of peace or war might depend on the action of a civil servant on the spot; and it seems to me that there is as much ground for the possession by the Crown of an unrestricted right of dismissal in the case of civil service as there is in the case of military service. When the authorities are referred to, they appear to be distinctly to the effect that there is such a right of dismissal. Besides the case in the House of Lords in which the expressions used by the learned Lords seem to be generally

applicable to the service of the Crown, there is the case of *Shenton* v. *Smith* (1), which was not a case of military service. It was there held that the appointment of the petitioner was subject to the power of the Crown to dismiss at pleasure. In my opinion, Sir Claude McDonald had no power to appoint a subordinate officer for a definite time, so as to bind the Crown not to dismiss him before that time expired. For these reasons I think the application must be dismissed.

Application dismissed. (2)

Solicitors for suppliant: *Dunn & Hilliard.*
Solicitor for Crown: *Solicitor to the Treasury.*

(1) [1895] A. C. 229.

(2) May 12, 1890.

[In the Court of Appeal.]

MITCHELL *v.* THE QUEEN.

Crown, Prerogative of—Military Service—Engagement made with Military Officer by the Crown — Petition of Right.

No engagement made by the Crown with any of its military or naval officers in respect of services either present, past, or future, can be enforced in any court of law.

APPEAL from the judgment of Mathew J. upon a demurrer to a petition of right.

The case set up by the suppliant in the petition may for the purposes of this note be summarized as follows. The suppliant, who had been a lieutenant-colonel in the Royal Engineers, had been allowed to retire from the service. By art. 80 of the Royal Warrant of June 10, 1884, it was provided that a lieutenant-colonel appointed as such to the Royal Engineers after September 30, 1877, should be placed on half-pay after completing five years' full-pay service from the date of his appointment to serve in the regimental rank of lieutenant-colonel. By art. 978, XIII., of the same Royal Warrant, "An officer who held rank not below that of major in our Royal Artillery or Royal Engineers on September 30, 1877, and who shall retire from our Army after having been removed from the regimental position of lieutenant-colonel under art. 80, shall have such an addition made to his retired pay fixed by art. 972 as our Secretary of State shall consider, on report of the Army Purchase Commissioners, a just equivalent with reference to any loss such officer may have incurred by the operation of any of our warrants of a later date than July 4, 1872. The principle on which such equivalent shall be calculated shall be determined with the concurrence of the Lords Commissioners of our Treasury."

The suppliant had under art. 80 of the warrant of 1884 been placed on half-pay on December 17, 1886, and had thereupon applied to be allowed to retire from the service. It was notified to him, by letter from the War Office, dated January 10, 1887, that the amount of compensation which would, in addition to his retired

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pay under art. 972, be awarded to him, as an officer whose case came within art. 978, XIII., of the warrant of 1884, would be 150*l.* per annum, which was stated in the letter to be "awarded in the usual course by the Army Purchase Commissioners on actuarial calculations approved of by the Treasury." The suppliant was allowed to retire, and was placed in retirement on January 17, 1887. The suppliant complained in substance that the amount awarded to him as compensation under art. 978, XIII., was not correctly calculated on an actuarial basis, and did not represent a "just equivalent" as contracted for by the Royal Warrant of 1884, and he therefore prayed for the payment to him of a further amount by way of compensation for loss incurred by him by the operation of Royal Warrants of later date than July 4, 1872.

The Attorney-General demurred to the petition.

Dillon O'Flynn, for the suppliant, contended that, by virtue of art. 978, XIII., of the Royal Warrant of 1884, and what had passed between the military authorities and the suppliant upon his retirement, there was a contract by the Crown to pay to the suppliant the amount of loss incurred by him as mentioned in that article calculated upon a correct actuarial basis. He argued that the case was distinguishable from cases in which it had been held that a military officer could not enforce payment of his pay or half-pay in a court of law, because in those cases the engagement of the Crown to make the payment must be considered as made with the officer as such while in actual service; whereas the engagement to pay a sum as compensation to the suppliant upon retirement from the service, being made after he had ceased to be in active service and had been placed on half-pay, stood on a different footing and must be treated as a contract made with him as a civilian. [He cited *Gibson* v. *East India Co.* (5 Bing. N. C. 262) and *In re Tufnell* (3 Ch. D. 164).]

R. S. Wright, for the Crown, was not called upon to argue.

LORD ESHER M.R. I agree with Mathew J. that the law is as clear as it can be, and that it has been laid down over and over again as the rule on this subject that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract. It has been argued that this is not to be treated as an engagement between a person in the military service of the Crown and the Crown, but as a contract made between a civilian and the Crown. The answer to that contention seems to me to be that it is contrary to the truth. At the time when the engagement was made the suppliant may have been on half-pay, but he was getting half-pay for being in the military service, although he may not have had any active service to perform. The engagement which was made between him and the Crown was made solely in consequence of his having previously been and still being at the time in the service of the Crown as a soldier. It was made with him as a soldier with reference to what the Crown would do for him upon his retirement because he had been a soldier in the service of the Crown. It is perfectly clear that such an engagement is within the rule which I have mentioned. The suppliant is not, it must be remembered, suing in respect of a

matter which is provided for by an Act of Parliament, but of a matter which arises under the War Office Regulations. It is a matter which arises between him and the Crown in consequence of certain regulations which the Crown has made with regard to its officers. It has been decided over and over again that, whatever means of redress an officer may have in respect of a supposed grievance, he cannot as between himself and the Crown take proceedings in the courts of law in respect of anything which has happened between him and the Crown in consequence of his being a soldier. The courts of law have nothing whatever to do with such a matter. The appeal must therefore be dismissed.

FRY L.J. I am clearly of opinion that no engagement between the Crown and any of its military or naval officers in respect of services either present, past, or future can be enforced in any court of law. That being so, I entirely agree with the Master of the Rolls.

LOPES L.J. concurred.

Appeal dismissed.

Solicitor for appellant: *F. F. Palmer.*

Solicitor for the Crown: *Solicitor to the Treasury.*

E. L.

[IN THE COURT OF APPEAL.]

ASFAR & CO. *v.* BLUNDELL AND ANOTHER.

Ship—Freight—Damage to Goods—Loss of Merchantable Character—Liability to pay Freight — Marine Insurance — Insurance of Profit—Warranty against Average—Concealment of Material Fact.

A vessel, on board which dates had been shipped under bills of lading making the freight payable on right delivery, was sunk during the course of the voyage, and subsequently raised. On arrival at the port of discharge it was found that although the dates still retained the appearance of dates, and although they were of considerable value for the purpose of distillation into spirit, they were so impregnated with sewage and in such a condition of fermentation as to be no longer merchantable as dates:—

Held, that freight was not payable in respect of them.

A ship having been chartered for a lump sum, the charterers put her up as a general ship, and goods were shipped on board under bills of lading at freights which in the aggregate exceeded the charter freight. The charterers insured their "profit on charter" by a policy which contained a warranty against average.

On arrival of the ship part of the cargo was delivered, and freight was payable under the bills of lading for that portion; but owing to sea damage the remainder of the cargo had lost its merchantable character, and freight was not payable in respect of it; the result being that the total amount of the freights payable under the bills of lading was less

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than the charter freight, and the charterers' profit was consequently lost:—

Held, that there had been a total loss of the subject-matter of the insurance within the meaning of the warranty:

Held, also, that the fact that the charter freight was a lump sum and not a tonnage rate, although material, had been sufficiently disclosed by a reference to the charterparty, a clause for payment of a lump sum for freight being a usual clause in charterparties, and the obligation to specifically disclose the contents of a charter extending only to unusual clauses, the insertion of which the underwriters could not reasonably have anticipated.

Decision of Mathew J. affirmed.

APPEAL from the judgment of Mathew J. in favour of the plaintiffs. (1) Upon the trial before the learned judge without a jury the following facts appeared:—

The plaintiffs were merchants at Bussorah, and the defendants were underwriters in London. On August 4, 1888, the plaintiffs entered into a charterparty with the owners of the steamship *Govino* for the hire of the said ship from Bussorah $\frac{\text{and}}{\text{or}}$ certain other places in the Persian Gulf to London for a lump sum of 3900*l.*, upon the terms that all freight earned by the ship should be for account of the charterers. The plaintiffs placed the steamer on the berths in the usual way at ports or places in the Persian Gulf, and cargo was shipped by various parties at certain rates of freight under bills of lading which made the freight payable on right delivery; the total of such bill of lading freights was 4690*l.* While the ship was in course of loading, the plaintiffs insured their profit on the charter for 2000*l.* with the defendants, who accepted the risk on ship on or about October 17.

The defendants, when they so agreed to become insurers of the plaintiffs, were not informed, and did not inquire as to, and did not know any of, the terms or conditions of the charterparty or of the bills of lading, nor that the charter was for a lump sum freight.

On October 23 the formal policy was underwritten by the defendants. By it the plaintiffs were expressed to be insured in respect of the *Govino* for 2000*l.* at or from any ports or places

(1) [1895] 2 Q. B. 196.

in the Persian Gulf to London. The interest insured was described as "2000*l.* on profit on charter . . . . Warranted free from all average." On or about October 26 the *Govino* sailed from the last port in the Persian Gulf at which she loaded cargo. After her arrival in the Thames, but before she had reached her discharging dock, and during the voyage covered by the policy, she was run into by another vessel, filled with water, and became almost entirely submerged for two or three tides, when she was raised and docked.

A portion of the cargo consisted of dates, which, being saturated with sewage and in a fermenting condition, were condemned by the sanitary authority as unfit for human food, and were not allowed to be landed in London. Although they were unmerchantable as dates, a large proportion of them retained the appearance of dates, and, notwithstanding that they were unfit for human food as dates, they were of considerable value, and were sold for 2400*l.* for the purpose of distillation into spirit, and were transhipped and exported. The part of the cargo which did not consist of dates was landed and delivered, and the lump freight of 3900*l.* became payable to the shipowners under the charterparty. The total of the bill of lading freights payable on the part of the cargo which was delivered to the consignees was less than 3900*l.* The plaintiffs brought the present action as for a total loss of profit on the charter, claiming 2000*l.* as on a valued policy, or in the alternative 790*l.*, being the difference between the lump freight payable by the plaintiffs under the charterparty and the total amount of the bill of lading freights which the plaintiffs would have been entitled to receive had the whole of the cargo been duly delivered in London. Mathew J. gave judgment for the plaintiffs for 790*l.* The defendants appealed.

Carver, for the defendants. First, there was not a total loss of the freight on the dates. To entitle the plaintiffs to freight, it was enough that on arrival the dates existed in specie. *Duthie* v. *Hilton* (1) is distinguishable: there the cement had ceased to exist as cement; but in the present case the dates still

(1) L. R. 4 C. P. 138.

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retained the form and substance of dates, and had not lost their merchantable quality. Secondly, even if freight was not payable on the dates, the defendants are not liable upon this policy, being protected by the warranty against average. Although only the profit was expressed to be insured, what was really at risk was the bills of lading freight, and the warranty must be read with reference to that subject-matter of insurance; so that there could be no total loss under the policy unless the whole of the bills of lading freight was lost. In the analogous case of an insurance of profit on goods, a warranty against particular average can only be satisfied by a total loss on the goods from which the profit is to be made. Assuming the profit to be 10 per cent. on the value, there would not be a total loss of profit for the purposes of a marine insurance policy if 10 per cent. of the goods were lost, although the whole of the profit would be swept away; there would be only a 10 per cent. loss on the profits: *Hodgson* v. *Glover* (1); Phillips on Insurance, s. 1503; Benecke on Marine Insurance, 31. There is no more difficulty in distributing the profit in the case of freight than in the case of goods. A warranty against average is a warranty against a partial loss of the subject-matter of the insurance.

Thirdly, assuming that the construction placed by the defendants upon the warranty against average is wrong, the plaintiffs were guilty of the concealment from the defendants of a material fact, that the freight, payable under the charterparty was a lump sum and not a tonnage freight. If the chartered freight had been a tonnage freight it would have been payable only on so much of the cargo as actually arrived, and the plaintiffs would have made a profit if any of the cargo arrived, namely, the difference between the charter and the bill of lading freights on that portion of the cargo. In such a case there would have been only a partial loss of profit, and there could not have been a total loss of profit to satisfy the warranty against average unless there had been a loss of the whole of the bills of lading freight. It was, therefore, material that the underwriters should know that the charter was for a lump sum

(1) 6 East, 316.

freight in order that they might estimate their risks; and the policy is void on the ground of concealment by the plaintiffs of a material fact. [He also cited *Dakin* v. *Oxley* (1); *Roux* v. *Salvador* (2); *The Bedouin* (3); *Haywood* v. *Rodgers* (4); *Tate* v. *Hyslop* (5); *Mercantile Steamship Co.* v. *Tyser*. (6)]

Joseph Walton, Q.C., for the plaintiffs, was directed to confine his argument to the third point. There was no concealment by the plaintiffs of a material fact. It is not suggested that a lump sum freight is not a common provision in a charterparty; and assuming that the fact was material, there was no duty on the plaintiffs to disclose it. It is only necessary to specifically disclose a clause in a charterparty where the clause is an unusual one; although everything in a charterparty relating to the payment of freight is in a sense material, it is impossible to contend that it must all be disclosed. [He cited *The Bedouin* (3); *Inman Steamship Co.* v. *Bischoff*. (7)]

LORD ESHER M.R. I am of opinion that this appeal should be dismissed. The first point taken on behalf of the defendants, the underwriters, is that there has been no total loss of the dates, and therefore no total loss of the freight on them. The ingenuity of the argument might commend itself to a body of chemists, but not to business men. We are dealing with dates as a subject-matter of commerce; and it is contended that, although these dates were under water for two days, and when brought up were simply a mass of pulpy matter impregnated with sewage and in a state of fermentation, there had been no change in their nature, and they still were dates. There is a perfectly well known test which has for many years been applied to such cases as the present—that test is whether, as a matter of business, the nature of the thing has been altered. The nature of a thing is not necessarily altered because the thing itself has been damaged; wheat or rice may be damaged, but may still remain the things dealt with as wheat or rice in

(1) 15 C. B. (N.S.) 646.
(2) 3 Bing. (N.C.) 266.
(3) [1894] P. 1.
(4) 4 East, 590.
(5) 15 Q. B. D. 368.
(6) 7 Q. B. D. 73.
(7) 7 App. Cas. 670.

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business. But if the nature of the thing is altered, and it becomes for business purposes something else, so that it is not dealt with by business people as the thing which it originally was, the question for determination is whether the thing insured, the original article of commerce, has become a total loss. If it is so changed in its nature by the perils of the sea as to become an unmerchantable thing, which no buyer would buy and no honest seller would sell, then there is a total loss. That test was applied in the present case by the learned judge in the Court below, who decided as a fact that the dates had been so deteriorated that they had become something which was not merchantable as dates. If that was so, there was a total loss of the dates. What was the effect of this upon the insurance? If they were totally lost as dates, no freight in respect of them became due from the consignee to the person to whom the bill of lading freight was payable—that is, to the charterers—and there was a total loss of the bill of lading freight on these dates.

Let us now consider what was the subject-matter of the insurance. The plaintiffs had chartered a ship in such a form that until she arrived at her destination they were to have the whole of her carrying power and capacity, paying to the owners an agreed sum as chartered freight. The plaintiffs were then, through their captain, to collect cargo and to give bills of lading in respect of it, and their profit would depend upon whether they received more for the bills of lading freight than they paid as chartered freight, the difference between the two being their profit. That was their speculation; and if by reason of the perils of the sea they were prevented from getting a larger sum as bills of lading freight than they were paying as chartered freight, they would get no profit from their venture. I may say that it is as nearly certain as possible in business that the chartered freight in such a case as the present would be a lump sum; it is the ordinary practice to stipulate for a lump freight. It must be taken, therefore, that in this case there was a lump freight, and the profit insured was the difference between that lump freight or chartered freight and the sum eventually earned as bills of lading freight, which is payable ordinarily at the port

of destination. There was here a total loss of the bill of lading freight on these dates; and that being so, there was no profit on the venture, the profit being the difference between the chartered freight and the bills of lading freight, which difference wholly disappeared with the loss of the freight on these dates. There was, therefore, a total loss of the subject-matter of insurance. The case was put on behalf of the defendants as though the subject-matter of the insurance had been the freight on the goods themselves—in which case the warranty against average loss might have applied; the contention, however, has no application to the facts of the present case, where the subject-matter of insurance was the difference between the two freights, which difference was totally lost.

I now come to the point that there was a concealment of a material fact by the plaintiffs when they effected the insurance. The rule as to this is well known, and as to it I feel no doubt. The assured is bound to disclose every material fact which is within his knowledge, and which is not to be taken as being within the knowledge of the underwriters. If he fails to do so, he is guilty of what is called in insurance law concealment, which may in fact be either innocent or fraudulent. But it is not necessary to disclose minutely every material fact; assuming that there is a material fact which he is bound to disclose, the rule is satisfied if he discloses sufficient to call the attention of the underwriters in such a manner that they can see that if they require further information they ought to ask for it. In this case the plaintiffs disclosed that there was a charterparty in existence, for one of the parts of the subject-matter of insurance was chartered freight; and further, that the subject-matter which the underwriters were asked to insure was the difference between the chartered freight payable by the assured to the shipowner, and the bill of lading freights which they were to obtain from the consignees of the goods. But having given this information, they did not tell the underwriters whether the chartered freight was a lump sum, or whether it was a tonnage freight depending upon the delivery of the goods to the consignees. But that the freight must be a lump sum was almost certain; and if the underwriters wanted to be sure on

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the point, they could have immediately acquired the knowledge by asking the question; the question ought to have been present to their minds. I think, therefore, that sufficient was disclosed by the plaintiffs to satisfy the rule that the assured must make a disclosure of the material facts, and I have no doubt that the learned judge in the Court below was justified in so holding. We are laying down no new law in the present case, which has to be determined on well known principles of the law of marine insurance; we have only to apply those legal principles to the facts of the case.

LOPES L.J. I am of the same opinion. The first point taken was that there was no total loss of the dates. But the facts shew that they had been submerged for two days, and that when they were again seen they were a mixture of date pulp and sewage and were in a state of fermentation and putrefaction; they had clearly lost any merchantable character as dates. In my judgment, it is idle to suggest that there was not a total loss of the dates, and that the plaintiffs were not entitled to recover as for a total loss of their freight. But then it was said that, even though there had been a total loss of the freight upon the dates, there was a profit on the rest of the cargo which prevented the plaintiffs recovering on this policy. In order to determine this question it is all important to consider what was the subject-matter of insurance, and as to this I agree with the learned judge below that it was the charterers' anticipated profit on the adventure—in other words, the excess of the bills of lading freights over the lump or chartered freight: that seems to me to be beyond all question. If that is the subject-matter of the insurance, can it be denied that, if that profit were entirely lost, the assured would be entitled to recover? In my opinion, it is impossible to deny that proposition, and the learned judge was perfectly right upon that point. Then it was further contended that there had been a concealment of a material fact by the plaintiffs, in that they had not disclosed to the underwriters the fact that the ship was chartered at a lump freight, and that as the freight might have been a tonnage freight they were bound to disclose the fact that it was not so, but was a lump sum. In

my opinion, the plaintiffs under the circumstances of this case disclosed all that was necessary. No doubt they were bound to disclose every material fact that was within their knowledge; but did they not disclose all that they were under any obligation to disclose to the underwriters? Upon this point it is not immaterial to bear in mind that it was highly probable that the chartered freight would be a lump sum and not a tonnage freight; it is indeed not denied that it is very usual in cases of this kind to charter a ship at a lump sum for freight. When this insurance was effected, the underwriters were distinctly informed of the subject-matter of the insurance—that it was profit on charter, that is, on chartered freight; and if they wanted further information as to the nature of the freight, they could have asked the question or have seen the charterparty. I think that the learned judge was right under the circumstances of this case in holding that sufficient had been disclosed by the plaintiffs to entitle them to recover upon the policy.

KAY L.J. I am of the same opinion. The action is brought against underwriters upon a policy of marine insurance, and on behalf of the defendants three points have been taken, two of which I think are very fairly arguable. The policy is one to insure "2000*l.* profit on charter," and the charter was for a lump sum of 3900*l.* The charterers took on board a general cargo of various classes of goods, among which were 700 tons of dates. The vessel was sunk in the Thames, the cargo remained under water for two days, and the dates were spoiled. Under these circumstances, was there or was there not a total loss of the bill of lading freight on the dates? If there was, then the profit, which was to be the excess of the bills of lading freights over the lump sum for chartered freight, was utterly gone, and there was no profit on the whole adventure; for the amount of freight received by the plaintiffs on the other bills of lading was less than 3900*l.* The defendant contends that there has been no change in the nature or character of the dates; that they were still dates, composed of stone, skin, flesh, and whatever else goes to make dates; that though it was true that they had been contaminated with sewage, and were not

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merchantable as dates, they were not the subject of a total loss. I agree that the substance of the dates still remained, and that they had not been changed into anything but dates in a peculiar condition. But does the law require the nature of the thing insured to be so far changed as was suggested in argument? In *Duthie* v. *Hilton* (1) cement had become wet and had lost its properties as cement; it had been changed into a hard substance, though all the cement was there; and it was held that no freight was payable in respect of it. That is really a very analogous case to the present. I think, therefore, that the learned judge below was right when he said, "Total destruction is not necessary, destruction of the merchantable character of the goods is sufficient; and in accordance with the principle recognised in *Roux* v. *Salvador* (2), *Dakin* v. *Oxley* (3), and *Duthie* v. *Hilton* (1), I hold that the plaintiffs were not entitled to receive freight in respect of these dates." Therefore, the bill of lading freight on the dates not being recoverable, the plaintiffs made no profit whatever on the whole adventure.

The second point taken is a very minute one, and I am not sure that I entirely appreciate it; it turns on the clause in the policy "warranted free from all average." It is said that, admitting if there was a total loss of the dates there was no profit in respect of them, yet there was a profit on the other goods on board when considered by themselves, and that thereby the average clause is brought into operation. But that argument omits to take note of the subject-matter of insurance, which was the difference between 3900*l.*, the chartered freight, and 4690*l.*, the bill of lading freight. That sum of 790*l.* was in point of fact the thing insured; that 790*l.* was totally lost to the plaintiffs, and I agree again with the learned judge when he says, "That argument must go the length of maintaining that the intention of the policy was to afford protection to the assured only in the event of a total loss of all freight. I cannot think that that was what the parties meant. I am satisfied that what was intended to be the subject-matter of the insurance was the charterers' profit on the adventure, the excess of the

(1) L. R. 4 C. P. 138. (2) 3 Bing. (N.C.) 266.
(3) 15 C. B. (N.S.) 646.

total bills of lading freights over and above the lump freight of 3900*l.*, and the intention was that in the event of a total loss of that profit the assured should be entitled to recover." I adopt that language, which I think affords a complete and perfect answer to this contention of the defendants.

With the third point I was certainly more impressed. It was this: that, when the policy was effected, there was a concealment by the plaintiffs of a material fact, because they did not disclose the fact that under the charterparty the freight was not to be a tonnage freight, but a lump sum. Beyond all question that was a material fact; for had it been a tonnage freight the underwriters would not have had to pay anything like the sum which by the judgment they are held liable to pay. But was this fact concealed by the plaintiffs? I agree that concealment is something more than non-disclosure: it is the keeping something back which it is the duty of the assured to bring specifically to the notice of the underwriters. Was there then in the present case a duty on the plaintiffs to specifically bring to the notice of the defendants the fact that the freight payable under the charterparty was a lump sum? It is agreed that, if a charterparty contains an unusual clause which it is very material to the underwriters to know, it is not enough for the assured merely to tell the underwriters that there is a charterparty in existence; the assured is bound to go further, and to state that it contains an unusual clause; if he does not do so, there is concealment which vitiates the policy. But here the clause is not unusual; it is common enough that a lump sum for freight should be inserted in a charterparty, and that it was a policy to insure profits on freight payable under a charterparty is explicitly stated in the policy itself. Were the plaintiffs bound to say more than that there was a charterparty, there being no unusual clause in that charterparty? I think not. The principle of law has been clearly laid down in recent years by Lords Blackburn and Watson in *Inman Steamship Co.* v. *Bischoff* (1), in which case the latter learned Lord says (2): "Seeing that the respondents when they accepted the insurance had

(1) 7 App. Cas. 670. (2) 7 App. Cas. at p. 687.

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notice that the *City of Paris* was under a contract of charterparty, I am of opinion that the policy attached to the freight therein stipulated, whether they did or did not choose to inform themselves of the particulars of the contract; and consequently, that the respondents became liable for such part of that freight as might be lost through any of the risks insured against during the period covered by the policy"; and there is a more recent statement of the principle by Gorell Barnes J. in *The Bedouin* (1). I adopt the doctrine as laid down by those learned judges; and I am of opinion that, although the fact alleged to have been concealed was a material fact, it was sufficiently disclosed by the reference to the charterparty; for the clause was not an unusual clause, and the underwriters might have inferred without looking at the charterparty that it would exist in this particular case.

Appeal dismissed.

Solicitors for plaintiffs: *Ince, Colt & Ince.*

Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

(1) [1894] P. 1.

W. J. B.

TYSER AND OTHERS *v.* THE SHIPOWNERS SYNDICATE (REASSURED).

1895
Dec. 3, 5.

Insurance (Marine)—Policy—Subscription by Syndicate—Contract whether Joint or Several.

A number of underwriters, styling themselves the S. Syndicate, by their manager underwrote a policy of marine insurance, the form of their subscription of which was as follows: "The S. Syndicate. C., Manager." Then followed the names of the individual members of the syndicate, against each of which names was written a certain fractional proportion of the total sum insured. The policy contained a special clause entitling the assured "by way of security for the performance of the obligations of the subscribing underwriters and of each and every of them" to the benefit by way of charge upon any policies of reinsurance that might be effected by them. The policy was in other respects in the form of an ordinary Lloyd's policy, the assurers being thereby expressed to bind themselves "each one for his own part":—

Held, that on the face of the policy the contract of the assurers was several and not joint, and that they were individually liable only for the proportions standing against their respective names.

ACTION tried before Mathew J. without a jury.

The defendants were a group of twenty underwriters, not members of Lloyd's, who styled themselves "The Shipowners Syndicate (Reassured)," and by a memorandum of agreement dated February 28, 1894, authorized a Mr. J. M. Corderoy, one of their number, to sign policies of marine insurance "on behalf of the syndicate and in the individual names of the members thereof, the said manager affixing opposite the name of each member of the syndicate on each and every policy the respective proportions of risk taken by each individual member of the syndicate on the said policy." By clause 11 of the agreement the manager was bound forthwith as risks were accepted on behalf of the members of the syndicate to reinsure the whole of the total loss risks, and the remainder of the risks in such manner as should be arranged between the manager and a Mr. T. R. Miller. By clause 16 all policies of reinsurance and moneys received thereunder were to be held by the manager in trust as security for the assured under each policy, and the

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special clause hereinafter mentioned was to be inserted in every policy.

The plaintiffs, who were underwriters at Lloyd's, effected with the defendants, through their manager, a policy of re-insurance upon a number of ships (including a ship named the *Brunswick*) for 79,300*l*. The policy contained the special clause above referred to, which was as follows: "It is specially agreed that the assured are hereby entitled by way of further security for the performance of the obligations of the subscribing underwriters and of each and every of them to the benefit by way of first charge of the policies of reinsurance effected or to be effected and all moneys received thereunder." The form of subscription to the policy was as follows:—

"The Shipowners Syndicate (Reassured).
John M. Corderoy, Manager.

John M. Corderoy	6½	thirtieths
Thomas A. Miller	1½	,,
William Hedges	2	,,
George Mauger	2	,,
A. L. Tweedie	2	,,
John Cory J. Herbert Cory	3	,,
Richard Cory	1½	,,
Barry Wake	1½	,,
J. Henry Champness	1	thirtieth
D. W. Corderoy	1	,,
F. H. E. Lenty	1	,,
George Lidgett	1	,,
Alfred E. Lidgett	1	,,
Oswald Lofthouse	1	,,
W. May	1	,,
W. B. Pattenden	1	,,
H. P. Wheatley	1	,,
P. Morel I. Morel	1	,,
	30	

of £79,300.
4th March 1895.
The Shipowners Syndicate (Reassured).
John M. Corderoy, Manager."

The policy was in other respects in the form of an ordinary Lloyd's policy, the assurers thereby promising and binding themselves "each one for his own part." The *Brunswick* became a total loss. Several of the members of the syndicate being unable to satisfy their liabilities, the action was brought for the purpose of trying the question whether the liability upon the policy of the subscribing members was not joint, so as to render the solvent members liable to discharge the liability of those who had failed.

H. Reed, Q.C., and *Scrutton*, for the plaintiffs. The contract of the members of the syndicate underwriting the policy is a joint contract, and each member thereby binds himself for the whole amount insured, and not merely for the proportion standing against his name. The use of the term "syndicate" imports a combination, and indicates that the subscription is that of a firm of partners. The proportions of the sum insured placed after the names of the respective members refer to liabilities of the members inter se, and do not affect their contract with the assured. If they intended to negative their joint liability they should have done so in express terms, as was done in the case of *Dowell* v. *Moon*. (1) Moreover, the special clause by which the policies of reinsurance are to be held as security for the performance of the obligations of the underwriters "and of each and every of them" points to the conclusion that those obligations were joint.

Joseph Walton, Q.C., and *Manisty*; *Warmington, Q.C.*, *Lewis Thomas*, and *W. de B. Herbert*; *Gore Browne*; and *Scott Fox*, for the various defendants. The liability of the defendants on the policy is several and not joint. The policy expressly provides that each subscriber binds himself only for his own part—a provision which cannot be overridden by the mere use of the descriptive title "syndicate." In *Dowell* v. *Moon* (1) the particular proportions for which the individual subscribers intended to bind themselves were not affixed opposite their names. The special clause means nothing more than that the assured shall be entitled by way of security for the performance

(1) 4 Camp. 166.

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of each subscribing underwriter's obligation to the benefit of his interest in any policy of reinsurance.

Cur. adv. vult.

1895. Dec. 5. MATHEW J. This action was brought to recover for a total loss of the ship *Brunswick*. The plaintiffs were underwriters at Lloyd's, who had reinsured with other underwriters, described in the writ as "The Shipowners Syndicate (Reassured)." The defendants are a group of underwriters, not members of Lloyd's, who, under the terms of an agreement, had authorized a manager named Corderoy to underwrite policies of marine insurance on account of the several persons forming the syndicate. The plaintiffs' policy had been effected with Corderoy as manager. It was in the ordinary form of a Lloyd's policy, and was described as a reinsurance on ships to the amount of 79,300*l.*, valued as per original policies. The usual clause provided that the assurers promised and bound themselves, each one for his own part, for the true performance of the contract in the policy, confessing the consideration paid. At the end of the policy the subscription was in the following form: [The learned judge read the subscription form of the policy as stated above.]

The question raised with reference to this policy was whether the liability of the members of the syndicate was joint or several. For the plaintiffs it was contended that the syndicate was in point of fact a firm or partnership; that the name "syndicate" imported combination for purposes of profit; and that there was therefore a joint liability upon the policy. For the defendants it was argued that upon the face of the policy the liability was several and not joint. It was said to be in the ordinary course of business that one underwriter should act for a number of other underwriters at Lloyd's, and should subscribe policies for each member of the group; and in support of that position, which was really not disputed, attention was called to the original policy effected by Tyser & Co. at Lloyd's, from which it appeared that insurances had been effected for eight gentlemen whose names, as in this case, were stamped on the policy, and who insured in different proportions a sum of 100*l.* It was said, when the terms of the

subscription to this policy were examined, that the same principle was followed, and that each member of the syndicate made himself responsible in the same way for the proportion which he underwrote of the amount insured. Then the plaintiffs' counsel called attention to the special clause in the policy under which the assured became entitled "to the benefit, by way of first charge, of the policies of reinsurance effected or to be effected by the subscribing underwriters and all moneys received thereunder." It was said that if it were left in doubt by the form of the subscription whether the liability were joint or several, this clause shewed an intention to enter into a joint undertaking, for it provided that there should be a "further security for the obligations of the subscribing underwriters and of each and every of them." This proved, it was said, that "syndicate" meant something equivalent to firm, company, or partnership. But, on the other hand, the word "syndicate" does not indicate in what way the members are acting together, and they are described in the clause as "subscribing underwriters." I see no ground for thinking that it was intended by this provision in the policy to enlarge the obligation of the underwriters or to extend the security which this special clause was intended to afford. If each underwriter was responsible only for the obligation created by his own subscription, it was unlikely that he should extend his liability to the obligations of his fellows; and the reasonable construction seems to me to be that each underwriter undertook that the benefit of any reinsurance to which he was entitled should be available for his assured. The clause seems to be intended to prevent the loss of the security by the insolvency of any of the underwriters, and the suggestion that the object was to cast on all the underwriters the possible loss of the security by the bankruptcy of any one of them seems improbable. I am therefore of opinion that the liability upon the policy is several and not joint.

Judgment accordingly.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for defendants: *W. A. Crump & Sons; W. H. Herbert; A. J. Oliver; Steavenson & Couldwell.*

J. F. C.

1895
Nov. 19.

In re MARDON.

Bankruptcy—Practice—Appointment of Trustee—Objection by Board of Trade—Costs—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 21, *sub-s.* 2.

When the Board of Trade at the request of a majority of the creditors notify to the Court, under s. 21 of the Bankruptcy Act, 1883, their objection to the appointment of a trustee in bankruptcy, the Court will not exercise any discretion in the matter on the merits of the case, but will only decide whether the objection is on the facts valid in point of law.

The fact that the trustee appointed by the creditors is an accounting party to the estate, and will as trustee have to investigate his own account, is of itself a valid objection.

In re Lamb ([1894] 2 Q. B. 805) discussed and followed.

When the Board of Trade object to the trustee appointed by the creditors, and at the request of the creditors notify that objection to the Court, and the creditors alone appear bonâ fide to oppose the objection of the Board of Trade, costs will not as a rule be given against the trustee although the objection is upheld.

THIS was a notification by the Board of Trade to the Court, pursuant to s. 21 of the Bankruptcy Act, 1883, of their objection to the appointment of a Mr. Forster to be the trustee in bankruptcy.

On April 5, 1895, the bankrupt Mardon executed a deed of assignment of all his property to F. Brown and Forster as trustees for the benefit of his creditors. This deed was duly filed on April 11, 1895.

Mr. Brown was the active trustee under the deed, and at once proceeded to deal with the debtor's property, and during the months of May and June realized nearly the whole of the debtor's estate and paid certain preferential rates and taxes.

On July 3 a bankruptcy petition was presented against Mardon grounded on the deed of assignment as the act of bankruptcy, and on July 31 a receiving order was made, and adjudication followed on August 12.

On August 23 the first meeting of the creditors was held, when Forster was unanimously elected the trustee in bankruptcy with a committee of inspection. Forster was himself a creditor for 500*l.* The same day Forster sent the following account

to the Board of Trade, and offered to pay the balance of 1436*l.* 15*s.* 11*d.* forthwith, and asked that his appointment as trustee might be confirmed :—

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In re MARDON.

Re JOHN MARDON.

CASH ACCOUNT PREPARED BY FRED. J. FORSTER.

1895	*Receipts.*	£	s.	d.	1895	*Payments.*	£	s.	d.
May 8	Stock, &c., realized.	1373	2	6	May 8	Cheque-book .	0	2	0
„ 14	Ditto	100	0	0	„ 14	Willman & Douglas—Valuation	12	12	0
June 29	Interest	3	1	9	„	William Gibson—Quarter's rent of West Street premises	8	15	0
					July 3	Robert Bainbridge—Rates	9	1	7
					„ 4	John Winship—Rates	5	0	10
					„ 11	John Hall—Taxes	3	16	11
							39	8	4
						Balance in Bank.	1436	15	11
		1476	4	3			1476	4	3

The Board of Trade declined to confirm the appointment of Forster as trustee in bankruptcy, pointing out that as trustee in bankruptcy he would have to investigate his own account

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as trustee under the deed of assignment, and invited him to withdraw from the trusteeship. Forster refused, and intimated that any attempt to remove him would be resisted.

Thereupon the Board of Trade, on August 30, formally objected to Forster's appointment as trustee in bankruptcy on the ground that "his connection with or relation to the bankrupt or his estate made it difficult for him to act with impartiality," and, at the request of the large majority of the creditors, notified their objection in the usual way to the High Court.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) and *Muir Mackenzie*, for the Board of Trade. This being a notification by the Board of Trade of their objection to the appointment of the trustee in bankruptcy, the Court has to consider and determine the validity of the objection: *In re Martin* (1); *In re Lamb.* (2)

[VAUGHAN WILLIAMS J. As I read the judgments of the Court of Appeal in the case of *In re Lamb* (2), I have no jurisdiction to exercise my discretion on the facts. I thought in that case that I had power to exercise my discretion on the facts, but the Court of Appeal held otherwise. I will not exercise any discretion in this matter. I will find the facts, and decide whether the objection is valid in point of law.]

It is submitted that the Court cannot decide on the validity of the objection without considering the facts of the case. Here, Forster, although he was not the active trustee under the deed of assignment, is nevertheless an accounting party to the trustee in bankruptcy.

[VAUGHAN WILLIAMS J. Do the Board of Trade admit this account to be correct? If so, I will deal with the case on that footing.]

The Board of Trade cannot make any such admission. It is not suggested that the account will be impeached, but it will have to be investigated and vouched; and if Forster is the trustee he will have to investigate his own account—a fact which makes it difficult for him to act with impartiality.

(1) 21 Q. B. D. 29. (2) [1894] 2 Q. B. 805.

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H. Reed, Q.C., and *Carrington*, for the trustee and the creditors. This objection is purely academic. The decision in *In re Martin* (1) is in favour of the trustee. Each case must be decided on its own circumstances. The account here speaks for itself, and shews no real conflict between Forster and the estate, and it is not contended by the Board of Trade that the account is incorrect. Under the circumstances no question can arise on this account, and there is no real substance in the objection. If it be upheld, then under no circumstances can a person, who has acted as a trustee under a deed of arrangement, become the trustee in bankruptcy, if bankruptcy should supervene. It is submitted that the judgments of the Court of Appeal in *In re Lamb* (2) do not take away the discretion of this Court. The 21st section of the Bankruptcy Act, 1883, was never intended to have that effect. The Court must have regard to all the circumstances of the case in order to find as a fact that the trustee's connection with or relation to the bankrupt or his estate "makes"—not "may" make, or "will" make—it difficult for him to act with impartiality. The circumstances here are not such as to make it difficult for Forster to act with impartiality. If the Court declines to exercise its discretion, *In re Martin* (1) is practically overruled.

Muir Mackenzie, in reply. This case falls exactly within the rule laid down by Cave J. in *In re Martin*. (1) No trustee under a deed of arrangement can be the trustee in bankruptcy, if he has acted under the deed.

VAUGHAN WILLIAMS J. This is a case arising under the 21st section of the Bankruptcy Act, 1883. That section, after providing for the appointment of the trustee by a resolution of the creditors, enacts that "the person so entitled shall give security in manner prescribed to the satisfaction of the Board of Trade, and the Board, if satisfied with the security, shall certify that his appointment has been duly made unless they object to the appointment on the ground that . . . . his connection with or relation to the bankrupt or his estate or any particular creditor makes it difficult for him to act

(1) 21 Q. B. D. 29. (2) [1894] 2 Q. B. 805.

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with impartiality in the interests of the creditors generally." In this particular case the creditors unanimously appointed Mr. Forster as the trustee in bankruptcy. Now, Mr. Forster and a Mr. Brown had been appointed trustees of a deed under which the bankrupt assigned to them all his property for the benefit of his creditors—such assignment being an act of bankruptcy. The acting trustee was Mr. Brown, but in point of title Mr. Forster was one of the trustees, and, as such, upon bankruptcy supervening, undoubtedly became accountable to the estate of the bankrupt for his dealings with the estate, or his dealings (if I may use the expression) as trustee de son tort. I say trustee de son tort, because if people act under a deed of this sort, during the time that the assignment is still available as an act of bankruptcy to support a petition, they are acting wrongly.

Now, the Board of Trade do not apparently approve of persons who have acted as trustees under a deed of arrangement being appointed trustees in bankruptcy. No doubt from the creditors' point of view there is very often a great deal to be said for the trustee, who has been acting wrongly under the deed, continuing to act as trustee in the bankruptcy, because these trustees are very often persons of good position and repute, and as to whose character, honesty, and propriety there is often no impeachment whatever; and the matter having gone into bankruptcy, it often would be a very large saving to the creditors that the person who has heretofore been dealing with the estate should continue to act after bankruptcy. In such cases the expense would often be very much less, and the estate realized would often be very much more. On the other hand, there are cases, and not unfrequent, in which the trustee under the deed is nominated in the interests of the debtor, or in some interest other than that of the creditors at large. There may be instances, and unfortunately there are, in which a trustee appointed under a deed considers the estate a mere subject for his personal benefit, and, under those circumstances, it may not be desirable that he should be continued. But however that may be, however much it may be to the interests of the creditors that the trustee under the deed

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should act as trustee in the bankruptcy, the position which I understand the Board of Trade take up is, that upon the balance it is found undesirable that that should be so, and that in all these cases the Board of Trade make the objection to the continuance of the trustee under the deed as the trustee in the bankruptcy.

Now, the Board of Trade having made this objection in this particular case, a majority of the creditors have requested that the objection should be notified to the High Court, and that thereupon the Court should decide upon the validity of the objection. In my judgment, I think I ought to find in favour of the validity of the objection—that is, I find that the trustee under the deed is accountable to himself as trustee in the bankruptcy, and that this position is one which in fact is likely to make him other than impartial. I am not finding that on the facts of this case Mr. Forster is likely to be placed in a position in which he will be tempted to be otherwise than impartial. On the contrary, the learned counsel for the Board of Trade when asked by me whether there was any particular item in the account which there was ground for impeaching said he could not say so as yet, for the accounts had not been examined. This being so, I merely decide that the objection of the Board of Trade is a valid objection because the trustee, as trustee under the deed, will have to account to himself as trustee in bankruptcy, and this makes it difficult for him to act with impartiality. When I decided *In re Lamb* (1) I thought that I ought to perform the same sort of duty which the Board of Trade in the first instance has to perform, that is, to decide whether in any particular case the Board of Trade ought to object to the appointment of the trustee. In other words, to decide whether, having regard to all the facts of the case, it is antagonistic to the impartial performance of his duties or the interests of the creditors to appoint a particular person trustee because of his knowledge of the affairs of the bankrupt. I still think that it would have been for the advantage of the creditors if the law had been as I supposed, and if I had a right to exercise that discretion which I then attempted to

(1) [1894] 2 Q. B. 805.

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exercise. But the Court of Appeal have held otherwise, and therefore I content myself with deciding that the objection is valid on the ground that I have stated, namely, that the trustee will upon the examination of the accounts have to act in a matter in which he is personally interested.

Muir Mackenzie. I ask for costs against the trustee: *In re Stovold* (1); *In re Martin.* (2)

H. Reed, Q.C. I appear for the creditors as well as the trustee. After the correspondence that took place between the trustee and the Board of Trade it was his duty to appear. The cases cited are distinguishable. In each of them the trustee claimed to retain certain moneys in his hands. There is nothing of the kind here. It is a very hard case, and it is submitted that the Court in the exercise of its discretion will not impose costs on the trustee.

VAUGHAN WILLIAMS J. I have no hesitation in saying that, in the absence of any further evidence, if Mr. Reed had appeared only for the creditors it would be monstrous to hold the trustee responsible for the costs. But Mr. Reed appears also for the trustee; and if the trustee chooses to appear I do not see how he can subsequently repudiate his obligations as a litigant. Any litigant who loses must pay. He takes his chance. If he had won he would have got his costs. The next trustee who is written to will probably answer discreetly, and will tell the creditors that if they wish to insist on him they must do it in their own name. Here the trustee, not unnaturally, having regard to the letters which were addressed to him, has appeared. One can quite understand that; but having appeared and lost, he must pay the costs.

Solicitor for Board of Trade: *R. Murton.*
Solicitors for respondents: *Iliffe & Co.*

(1) 6 Morrell, 7. (2) 21 Q. B. D. 29.

H. L. F.

Applied. BRITISH MOTOR TRADE ASSN. *v.* SALVADORI. [1949] 1 Ch. 556

[IN THE COURT OF APPEAL.]

C. A. 1895 *Oct.* 31; *Nov.* 2.

EXCHANGE TELEGRAPH COMPANY LIMITED *v.* GREGORY & CO.

Copyright—Injunction—Right of Property in Unpublished Information—Action, Cause of—Procuring Breach of Contract—Proof of Damage.

In order to support an action for maliciously inducing persons to break their business contracts with the plaintiff proof of specific damage need not be given; it is sufficient to prove facts from which it may properly be inferred that some damage must result to the plaintiff from the defendant's wrongful acts.

Under a contract made between the plaintiffs and the committee of the London Stock Exchange, valuable information as to the prices of stocks and shares from time to time during the day was collected on the Stock Exchange, and supplied to the plaintiffs, and printed on tapes and sheets of letterpress in their office. The defendant, having surreptitiously obtained such information, published it in the same form before its publication by the plaintiffs:—

Held, that the plaintiffs had a right of property at common law in the information, and were entitled to an injunction to restrain the defendant from infringing that right by continuing to publish it.

APPEAL from Mathew J.

The action was brought for an injunction to restrain the defendant from infringing the plaintiffs' copyright in a newspaper, and from committing, or continuing to commit, other alleged wrongful acts, and for damages.

The material facts proved at the trial were as follows:—

The plaintiff company is a telegraphic news agency, carrying on business in Cornhill, in the city of London, and other places, under the licence of the Postmaster-General permitting the company to send telegraphic messages.

By an agreement made between the plaintiff company and the committee of the Stock Exchange, the company has had for many years, in consideration of payments made to the committee, the sole privilege of obtaining the quotations in stocks and shares from the floor of the Stock Exchange. Information as to the buying and selling price of stocks and shares, with the time of each quotation, was collected by a

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member of the Stock Exchange, appointed and paid by the company, constantly throughout the day, and he recorded in writing the information which he had obtained, and supplied it to a telegraphic operator, who, by a Morse electrical machine placed in the Stock Exchange, immediately transmitted the information to the company's office. This financial information has long been known as "tape prices" or "tape quotations," and as being the information as to the prices of stocks and shares obtained only by the company. When the information arrived at the company's office, one of their clerks forthwith transmitted it, as it came out on the tapes, by similar electrical means to their subscribers, and it was instantly and simultaneously printed, by a recording instrument placed in each subscriber's office, upon a proper tape. Each subscriber, by his contract with the company, agreed to pay an annual sum to the company for the information so supplied, and it was part of the terms of each contract that the intelligence supplied by the company should not be sold or communicated to non-subscribers for a pecuniary consideration or otherwise. Immediately upon the arrival of the information at the company's office from the Stock Exchange, and simultaneously with its transmission to the subscribers, another clerk, by a type-writing machine, recorded the same information, and the sheets upon which it was printed by the typewriting machine were made up into a newspaper, called *The Exchange Telegraph Company's Stock Exchange News*, and sold by the company to any person who wished for a copy. The newspaper was duly registered as copyright at Stationers' Hall. The defendant, who carried on the business of an "outside broker" under the name of "George Gregory and Company," had formerly been one of the company's subscribers, and he knew that, by the terms of their contract with the company, subscribers were prohibited from communicating the information to non-subscribers. In the beginning of the year 1894 his contract with the company came to an end; and, the committee of the Stock Exchange having objected to the information being supplied to the defendant and other outside brokers, the company declined to continue him as one of their subscribers. Subsequently the defendant obtained the com-

pany's tape prices from one of their subscribers, and posted it up on boards and other places in his office, the information being transmitted, as soon as it arrived, from the subscriber to the defendant by a transmitting machine. There was evidence at the trial that the defendant threatened and intended to continue the acts complained of in the statement of claim, which were: (1.) printing or multiplying, and continuing to print or multiply, copies or colourable imitations of the plaintiff company's copyright information as published in the newspaper and tapes entitled *The Exchange Telegraph Company's Stock Exchange News*; (2.) obtaining such copies or colourable imitations from the plaintiff company's tapes or sheets of letterpress and communicating the same to persons frequenting the defendant's offices; and (3.) inducing subscribers of the company to break their contracts with the company by supplying the defendant with the said information.

Mathew J. gave judgment for an injunction restraining the defendant from "printing or multiplying copies or colourable imitations of the plaintiffs' copyright information as published in the newspaper and tapes entitled '*The Exchange Telegraph Company's Stock Exchange News*,' and from continuing to print and multiply copies or colourable imitations of the said copyright information as published by the said plaintiffs, or to obtain such copies or colourable imitations from the plaintiffs' tapes or sheets of letterpress, and from continuing to induce any subscriber of the plaintiffs to supply the defendant with the said information in breach of his contract with the plaintiffs."

The defendant appealed.

Crackanthorpe, Q.C., and *Macaskie* (*Cock, Q.C.*, with them), for the appellant. It is clear from the evidence that the defendant obtained the information in question, not from the printed lists published by the company as a newspaper, but elsewhere, and the true inference is that he obtained it before those lists were published. There was, therefore, no infringement of the company's statutory copyright in the newspaper. The printed lists were not a literary composition which could be the subject of statutory copyright: *Chilton* v. *Progress*

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Printing and Publishing Co. (1) As to the alleged invasion of the company's right of property in unpublished matter, there was no publication by the defendant of a composition not communicated nor intended to be communicated by the composer to the public, as in *Caird* v. *Sime*. (2) The information here was always intended by the company to be published. They have not shewn that any damage has resulted, or is likely to result to them, from the publication, and Courts of Equity will not grant an injunction unless some actual or probable damage to the applicant from the acts complained of is shewn. Further, no action will lie for inducing subscribers to break their contracts with the company unless special damage be proved. In *Lumley* v. *Gye* (3), *Bowen* v. *Hall* (4), *Temperton* v. *Russell* (5), and *Flood* v. *Jackson* (6), injury to the plaintiff was proved as one of the necessary ingredients entitling him to sue for an actionable wrong.

Bigham, Q.C., and *Montague Shearman* (*Scrutton*, with them), for the respondents. It is clear on the evidence that, in some cases at any rate, the defendant must have published the tape prices after they had appeared on the company's printed lists, because the lists were published simultaneously with the communication of the information to the company's subscribers. In those instances there was an infringement of the company's copyright, under 5 & 6 Vict. c. 45, s. 15 (7), in their letterpress

(1) [1895] 2 Ch. 29.
(2) 12 App. Cas. 326.
(3) 2 E. & B. 216.
(4) 6 Q. B. D. 333.
(5) [1893] 1 Q. B. 715.
(6) [1895] 2 Q. B. 21.
(7) 5 & 6 Vict. c. 45, s. 15: "If any person shall, in any part of the British dominions, after the passing of this Act, print or cause to be printed, either for sale or exportation, any book in which there shall be subsisting copyright, without the consent in writing of the proprietor thereof . . . . or, knowing such book to have been so unlawfully printed . . . . shall sell, publish, or expose to sale or hire, or cause to be sold, published, or exposed to sale or hire, or shall have in his possession for sale or hire, any such book so unlawfully printed, ... without such consent as aforesaid, such offender shall be liable to a special action on the case at the suit of the proprietor of such copyright," &c.

By s. 2, in the construction of this Act the word "book" shall be construed to mean and include (inter alia) "every volume, part or division of a volume, pamphlet, sheet of letterpress, ... separately published"; and the word "copyright" shall be construed to mean "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied."

or newspaper. The copyright in a newspaper or book subsists as soon as the newspaper or book is published, and to continue to circulate copies is an infringement. Where the tape prices published by the defendant were published before the publication of the company's printed lists, their right of property at common law in unpublished information collected by them was invaded, and they are entitled to an injunction. The principle stated in *Jefferys* v. *Boosey* (1) and affirmed in *Caird* v. *Sime* (2) applies—that an author has a right of property in his work which entitles him to prevent its publication by others until it has, with his consent, been communicated to the public. Where such right of property has been attacked no evidence of damage is necessary. Further, no specific evidence of damage is necessary in order to support the company's claim for an injunction against the defendant for having induced their subscribers to break their contracts. The acts complained of constitute such an interference with the business carried on by them as must result in damage, and that is sufficient evidence of damage.

Crackanthorpe, Q.C., replied.

LORD ESHER M.R. In this case the defendant has done a mean and contemptible act, and, upon any doubtful point of his conduct in other respects which may arise, I shall draw an inference against him, because I know that a man who has done one contemptible thing to benefit himself will do another, if necessary, in order to carry out and complete the object he has in view. Now, what has happened here? The things done on the Stock Exchange are things which are altering every minute of the day, and it is of the greatest importance and value to the persons who engage in transactions there that they should know, not only what things are being done at a particular moment, but what things of the same kind have been done on the same day. What is done is done in a place belonging to the members of the Stock Exchange and managed by a committee, who have a right to deal with what is done in it as they think fit, and persons admitted to that place are

(1) 4 H. L. C. 815. (2) 12 App. Cas. 326.

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bound to submit to the terms imposed upon them by the committee. The committee have the right to deal in their own way with that very valuable information of what is being done, or has been done earlier in the day. It is of very great value to have that information almost from minute to minute. The committee deal with the matter in this way. They take means to have collected and recorded what is being done and what has been done in the great majority, if not in all, of the transactions during the day, and they take means to give constant and instant information in those respects. They give that valuable information, as they have a right to do, to the plaintiffs, and the plaintiffs pay them for it, and are allowed to supply it to their own subscribers, who pay the plaintiffs for it. But the committee of the Stock Exchange say, "We will not allow this valuable information to be given to certain persons who are what is called 'outside brokers,' and are not subject to the rules of the Stock Exchange." This Court is not concerned to say whether that was a reasonable view for the committee to take. They chose to refuse, and they had the right to refuse, to allow the information to be given to those outside brokers. In order to carry out that decision of the committee the plaintiffs give the information to their subscribers upon the condition that they will only use it themselves, in their own transactions of purchases and sales, and that they will not, at any rate, sell it to anybody else. The defendant relies on the fact that the plaintiffs will not take him in as a subscriber; but that does not justify him in doing the dishonest and contemptible thing which he has done. He knew that the plaintiffs had made this contract with each of their subscribers. He knew that the information would be very valuable to himself in his business as a broker, and he used it to entice people to go into his office and deal with and through him. He wanted the information for the purpose of making money, and he persuaded somebody, one of the plaintiffs' subscribers, to give it to him from time to time—for money, I have no doubt. He therefore persuaded that person to break his contract with the plaintiffs, and so to commit a gross breach of faith and honour. This information —this collecting together of materials so as to give knowledge

of all that has been done on the Stock Exchange—is something which can be sold. It is property, and being sold to the plaintiffs it was their property. The defendant has, with intention, invaded their right of property in it, and he has done so surreptitiously and meanly. It is said that the plaintiffs have not been injured; but what the defendant has done must have injured them. I can imagine various ways in which it might injure them. Persons to whom this information, supplied from hour to hour, is valuable must, if they could not get it in any other way, buy the plaintiffs' newspaper. That is some damage. To say that the damage must be such as can be measured—that you must shew how much the wrongful act complained of would injure the person against whom it was done—is no answer. A man who does such a wrongful act as the defendant has done lays himself open to be told by the tribunal before whom he appears, "You *have* damaged the plaintiff. You have done a contemptible and fraudulent act against him, and have invaded his common law right, and therefore you must have damaged him." In such a case the jury may give any damages. It is not necessary to give proof of specific damage. The damages are damages at large. In cases of trespass to land by walking over it the damage cannot be measured or estimated, but the plaintiff is entitled to such damages as the jury may give him for the invasion of his right; and the same applies in the case of an assault, where the plaintiff has received no real hurt. Though I think there must be some damage to support an action for the infringement of the plaintiffs' common law right, it is enough to shew that the act complained of was done in such a way as to be likely to damage the plaintiff, though proof of specific damage be not given. As to the statutory copyright in the plaintiffs' newspaper, I think a great deal of the argument addressed to us was not warranted by the facts. I have no doubt myself that the proper inference is that the defendant published the information after it had been already published in the newspaper. Some of it, at any rate, had first appeared in the newspaper. If that be so, there was a sufficient infringement of the plaintiffs' statutory copyright. Further, the defendant insisted

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upon his right so to publish the information, and said that he intended to continue publishing it.

I am, therefore, of opinion that the learned judge was right in granting the injunction; that every part of it was right, and that this appeal should be dismissed.

KAY L.J. I am of the same opinion. The injunction was granted under three heads—first, to restrain the defendant from printing or multiplying, and continuing to print or multiply, copies of the plaintiffs' copyright information as published in their newspaper and tapes; secondly, to restrain him from obtaining such copies from the plaintiffs' tapes or sheets of letterpress; and, thirdly, to restrain him from continuing to induce any subscriber of the plaintiffs to supply the defendant with information in breach of the subscriber's contract with the plaintiffs. I think that the learned judge was justified by the facts in granting the injunction on all those heads. Shortly stated, the facts are these: The Stock Exchange, by the permission of the committee, supplied to the plaintiffs certain very valuable information, which the plaintiffs paid for; but that information was supplied upon the condition that it should not be communicated to certain outside brokers. The plaintiffs communicated it, as they were entitled to do, to their own subscribers; but they communicated it upon a condition, agreed to by each subscriber, which was as follows: "Instruments are supplied to subscribers on the distinct understanding that they are required for their own personal information, and that they will not be advertised as in connection with the Stock Exchange or otherwise. The intelligence supplied by the company is copyright; is to be used only in the office or other place in which it is delivered, and is not to be sold or communicated to non-subscribers for a pecuniary consideration or otherwise." Now, it is a very material fact that the defendant was at one time a subscriber of the plaintiffs, and bound by that same agreement or condition. He, therefore, perfectly well knew that subscribers were bound not to communicate the information, and with that knowledge, when he is no longer allowed to be a subscriber because he is an outside broker, he commits the

grossly fraudulent act of going to persons who are subscribers and have the information, and inducing them to communicate it to him, and then publishes it on boards in his offices for the purposes of his business. The information is absolutely essential to him in his business. If he did not obtain this information of what was happening, or had happened, on the Stock Exchange from time to time during the day he would be extremely hampered in his business; and the only mode of obtaining it otherwise than as he did would be by taking it from the plaintiffs' newspaper, which was published six times a day, and in which they had a statutory copyright. In order to obtain it in that way he would have to buy the newspaper. As to the first head of the injunction, I have felt some doubt whether the evidence justified one in inferring that the defendant published the information upon his boards after it had been published in the plaintiffs' newspaper. But the evidence shewed that the plaintiffs issued their newspaper six times a day simultaneously with the communication to their subscribers. It is, therefore, hardly possible that the defendant should have put it up on his boards before the newspaper was printed. The necessary inference is that he put it up afterwards. But there might be instances in which he put it up before the newspaper was printed, and in those cases there might be a doubt whether what the defendant did was an infringement of the plaintiffs' statutory copyright in the newspaper, or whether it was an infringement of their common law right of property in the information. The judge at the trial, therefore, in order to restrain every possible infringement of the plaintiffs' right, granted the injunction in both forms, so as to restrain the defendant from publishing the information after it had been printed in the newspaper, and, under the second head of the injunction, to restrain him from taking it, before it was printed in the newspaper, from the plaintiffs' tapes or sheets of letter-press. As to the third head, it was argued that the defendant was not bound by any contract with the plaintiffs, and that, in order to maintain an action against him for inducing subscribers to break their contracts with the plaintiffs, damage to the plaintiffs must be shewn. I agree that the gist of the action

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would be damage; but if a judge or jury could properly infer from the acts complained of that those acts must result in damage to the plaintiffs, that is enough. As I have already pointed out, if the defendant had not obtained the information fraudulently the only other way would have been to get it from the newspaper, which he must have bought. But further, what the defendant did was a direct interference with the plaintiffs' business. It was an obtaining of very valuable information, in respect of which the plaintiffs made profits by communicating it to a limited number of persons. It is obvious that what the defendant did could be done by others, and very few persons would become subscribers if the information could be got by inducing some person who had it as a subscriber to communicate to others in this way. The inference is irresistible that damage must accrue to the plaintiffs from such an act as the defendant has committed. I think, therefore, that the injunction was also properly granted under the third head. I am of opinion that the appeal should be dismissed.

RIGBY L.J. I am of the same opinion. The action is founded upon three main causes, or alleged causes, of action. The first is, an attack made upon the proprietary right of persons in unpublished matter; the second, an attack made upon the proprietary right of persons in matter which they have published; and the third, an attack made upon the right or interest of persons in the business which they carry on. As to the first of such rights, no registration and no proof of damage is necessary in order to support the action; as to the second, registration is necessary, but not any proof of damage; as to the third, unless damage be shewn to have been actually sustained there is no right of action, the fact of damage being the only thing which brings the defendant into any relation with the plaintiff. The first question is, had the plaintiffs here at any time a proprietary right in written matter which was unpublished? The facts are that certain written matter was produced in their office by means of a telegraphic machine, though it is immaterial whether it was produced in that way or by writing the information down. There is written on the

tapes or sheets of letterpress information in the shape of certain words in certain applications. It is written matter, and it is the property of the persons who have paid for, and are using, the information which has been collected for them. The case of *Chilton* v. *Progress Printing and Publishing Co.* (1), cited by counsel for the defendant, is not in point. There a piece of information was taken from a publication of the plaintiffs and used as information in another publication which had no resemblance in form or in the literary part. The written matter in the present case is, in my view, literature within the decided cases. It was the property of the plaintiffs before its publication in the newspaper, and after that publication they were entitled to copyright, or a monopoly of the right to multiply copies. I come to the conclusion, on the facts, that the information was published by the defendant sometimes before, and sometimes after, its publication in the newspaper, and I think the injunction was justified in both forms—namely, restraining the infringement of the plaintiffs' right of property at common law in the information, and restraining the infringement of their statutory copyright. I do not see how it can be said that because this information was intended to be supplied to a large section of the public the plaintiffs are deprived of their right to protection in respect of it. They were entitled to limit the supply of that information in such lawful manner as they thought fit; and it is plain that they did contract with the persons to whom they supplied it that those persons should not, either by sending telegrams or furnishing copies, supply it to others. As to the third cause of action, it is not, as I understand the law, every procuring of a breach of contract that will give a right of action. The nature of the contract broken must be considered. It is conceivable that in some cases a release from his contract might be the thing which the plaintiff most desired, and was most to his advantage. In such cases there would be no right of action, because the plaintiff's position would be improved instead of injured. We must consider the nature of the contract which the plaintiffs made with their subscribers, and we are entitled to draw the same conclusion as a jury might reasonably draw.

(1) [1895] 2 Ch. 29.

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That being so, I come to the conclusion that damage to the plaintiffs, through the defendant having induced a subscriber to break his contract with them, has been sufficiently proved. I cannot doubt, having regard to the importance of the information, and the importance to the plaintiffs in their business of prohibiting the persons to whom they supply the information from supplying it to others, that some damage ought to be inferred. The defendant would have to buy the newspaper if he could not get the information in the way he has been getting it. I care not how much or how little is the injury sustained by the plaintiffs, but I think some injury has been made out. It appears that the defendant intends to go on doing the acts of which the plaintiffs complain, and I am of opinion that they are entitled to the injunction which has been granted.

Appeal dismissed.

Solicitors for appellant: *Bennett & Leaver.*
Solicitors for respondents: *Nicholson & Crouch.*

W. A.

1896
Jan. 20, 21.

THE QUEEN *v.* THE MAYOR, &c., OF PLYMOUTH.

Sea Fisheries—Fisheries Committee—Appointment of Officer—Conditions as to Expenditure—Power of one of several Councils to impose—Sea Fisheries Regulation Act, 1888 (51 & 52 *Vict. c.* 54), *s.* 6.

By s. 6, sub-s. 1, of the Sea Fisheries Regulation Act, 1888, "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient" for the purposes therein specified:—

Held, that the restrictions and conditions as to expenditure in connection with the appointment of a particular officer cannot be made after the officer has been appointed.

Semble, that where a local fisheries committee has been appointed by more county or borough councils than one, it is open to any one of such councils to make restrictions or conditions as to expenditure under the above section without the assent of the other councils.

MANDAMUS to the mayor, &c., of Plymouth to pay their proportion of the expenses of the Devon Sea Fisheries Committee.

1896

THE QUEEN v. MAYOR, &c., OF PLYMOUTH.

By an order of the Board of Trade, made March 31, 1892, under the Sea Fisheries Regulation Act, 1888 (1), a sea fisheries district was created, comprising the whole of the coasts of the county of Devon and a portion of those of the county of Cornwall; and for the regulation of the sea fisheries in such district a local fisheries committee was constituted, which committee was to be a joint committee of the county councils of Cornwall and Devon, and of the councils of the county boroughs of Devonport, Plymouth, and Exeter, and was to consist of forty-two members, of whom one was to be appointed by the county council of Cornwall, ten by the county council of Devon, one by the borough council of Devonport, five by the borough council of Plymouth, and one by the borough council of Exeter, with the addition of twenty-four members representing the fishery interests of the district.

At a meeting held in July, 1894, the committee appointed an inspector to enforce the observance of their by-laws within the district, under s. 6 of the Act; and the borough council of Plymouth did not at the time of such appointment make any restrictions or conditions as to the expenditure connected

(1) By the Sea Fisheries Regulation Act, 1888, s. 1, sub-s. 2, "The local fisheries committee for a sea fisheries district shall be a committee of a county council or borough council, or, if two or more councils appear to be interested, a joint committee of those councils . . . ."

Sub-s. 3: "The law relating to committees and joint committees of county councils shall, subject to the provisions of the order constituting a local fisheries committee, apply to the local fisheries committee in like manner as if the powers and duties of that committee were powers and duties transferred by the Local Government Act, 1888, to the council or councils represented on the committee and delegated to the committee by the said council or councils, and as if any borough council represented on the committee were a county council."

Sect. 6, sub-s. 1: Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient for the purpose of enforcing the observance within their district of bye-laws made by the committee."

By the Local Government Act, 1888 (51 & 52 Vict. c. 41), s. 81, sub-s. 6, "The costs of a joint committee shall be defrayed by the council by whom any of its members were appointed, or if appointed by more than one council in the proportion agreed to by them; and the accounts of such joint committee and their officers shall, for the purposes of the provisions of this Act, be deemed to be accounts of the county council and their officers."

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therewith. On August 20, 1894, the committee issued their precepts to the various councils by whom the committee were appointed for their respective shares of the estimated expenses of the committee for the then current year, the share of the Plymouth Borough Council being 112*l.* 10*s.* Of this sum the said borough council tendered 58*l.* 15*s.*, but objected to pay the balance of 53*l.* 15*s.*, as being expenditure connected with the appointment of the said inspector, in which appointment they declined to concur. The committee then obtained a rule for a mandamus to the borough council of Plymouth to pay the said money out of their borough fund.

Lawson Walton, *Q.C.*, and *Bonsey*, for the defendants, the borough council of Plymouth, shewed cause. The appointment of the inspector was subject to any conditions as to expenditure which the defendants might make. The defendants refused to concur in the appointment. The fisheries committee ought to have ascertained beforehand whether the defendants were willing to concur, and if they chose to make the appointment without having first obtained the defendants' consent they cannot afterwards seek to charge them with a share of the cost. Under s. 6, sub-s. 1, of the Sea Fisheries Act, any one of the councils by whom the fisheries committee is appointed may object to the appointment of an officer, and impose the restrictions and conditions there mentioned. It is not necessary that all the constituent councils should join in making such restrictions. If it were so, the section would be practically unworkable.

Channell, *Q.C.*, and *Duke*, for the Devon Fisheries Committee. The restrictions or conditions as to expenditure contemplated by s. 6 are prospective only; they cannot be imposed after the appointment is made. Further, the defendants had no power by themselves, and without the concurrence of the other councils, to impose any restrictions on the committee's expenditure; they were liable to be outvoted on that matter by the other councils. The restrictions have to be "made by the council or councils by whom a local fisheries committee is appointed." The defendants cannot bring themselves within those words. They are not "the council," for the committee

was appointed by more councils than one; nor do they represent "the councils," for the other councils do not concur in the restrictions.

The judgment of the Court (Hawkins and Vaughan Williams JJ.) was delivered by

VAUGHAN WILLIAMS J. This is a rule calling on the corporation of the borough of Plymouth to shew cause why a writ of mandamus should not issue commanding them to pay to the Devon Sea Fisheries Committee the sum of 112*l.* 10*s.*, being the part payable by them of the amount required for the expenses of the said committee. As to 58*l.* 15*s.*, part of the sum demanded, the borough of Plymouth do not dispute their liability. But their liability for the remainder they do dispute, on the ground that it relates to expenses connected with the appointment of a fishery inspector, to whose salary and incidental expenses they object to contribute. In order to ascertain whether that objection can be maintained it is necessary to consider what is the position of a local fisheries committee appointed under the Sea Fisheries Regulation Act, 1888. By s. 1, sub-s. 2, of that Act, "The local fisheries committee . . . . shall be . . . . if two or more councils appear to be interested, a joint committee of those councils." And by sub-s. 3, "the law relating to joint committees of county councils shall . . . . apply to the local fisheries committee." Then by s. 81, sub-s. 6, of the Local Government Act, 1888, "The costs of a joint committee shall be defrayed by the council by whom any of its members were appointed, or if appointed by more than one council in the proportion agreed to by them." The costs, then, of the fisheries committee are to be borne by the several councils whose delegate the committee is. But the Local Government Act does not give to the constituent councils who appoint a joint committee any general power of controlling such committee's expenditure. And this seems to be assumed by the order of the Board of Trade in the present case, which orders that "Except as provided by s. 6 of the Act no council shall make . . . . any regulations . . . . respecting the . . . . proceedings of the committee hereby constituted; . . . . provided that

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any council may make a regulation requiring the committee to submit to such council once in each year an estimate of expenses proposed to be incurred by it under the Act," and that "Subject to any restrictions or conditions made under s. 6 of the Act, the committee shall not be required to report its proceedings to any council, nor shall its acts or proceedings be submitted to any council for approval." The only power, then, that the constituent councils have of controlling the expenditure of the fisheries committee is that of making the restrictions and conditions under s. 6. But in our opinion the restrictions and conditions there referred to mean restrictions and conditions in existence at the date when the committee's power of appointing an officer is exercised. Here the borough of Plymouth did not make any restrictions or conditions prior to the appointment of the inspector, and any attempt to make them after such appointment is too late. The borough of Plymouth, therefore, are liable to contribute to the expenses of such inspector and the mandamus must go. With regard to the coming year, any fresh appointment of an officer will be subject to any restrictions and conditions which the council of the borough may choose to make in the interval.

Rule absolute.

Solicitors for Devon Fisheries Committee: *Field & Roscoe, for H. Ford, jun., Exeter.*

Solicitors for corporation of Plymouth: *Sharpe, Pritchard & Co., for J. H. Ellis, Plymouth.*

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1896
Jan. 20.

D'ERRICO *v.* SAMUEL AND ANOTHER.

Practice—Remitting Action to County Court—Transfer of Action, when made—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 66.

Where an order has been made for the remission of an action to a county court under the County Courts Act, 1888, s. 66, the action remains in the High Court, until the plaintiff has lodged the original writ and the order with the registrar of the county court in accordance with the section; and, consequently, until that has been done the High Court still has jurisdiction to make an interlocutory order in the action.

APPEAL from an order of Lawrance J. at chambers.

The facts were as follows. The action was one of tort. An order had been obtained by the defendants under s. 66 of the County Courts Act, 1888, that the action should be remitted to the City of London Court, unless the plaintiff gave security for the defendants' costs to the satisfaction of a master within a certain time. The plaintiff did not give security as required by the order, and the time for so doing expired on December 12, 1895. On December 13 a master at chambers made an order in the action, directing the defendants to give further and better answers to interrogatories which had been administered by the plaintiff to the defendants. The plaintiff had not lodged the writ and the order remitting the action with the registrar of the City of London Court.

On appeal, the learned judge at chambers reversed the order of the master on the ground that, as soon as the order for the remission of the action had become absolute by reason of the plaintiff's failure to give security in accordance with it, the action was transferred to the City of London Court, and the High Court had no longer any jurisdiction over it.

Witt, Q.C., and *Rockingham G. Gill*, for the plaintiff. The case of *Welply* v. *Buhl* (1) is a conclusive authority that the action is not transferred to the county court merely by virtue of the order for remission, and the jurisdiction of the High

(1) 3 Q. B. D. 80 253.

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Court over it continues until the plaintiff has lodged the writ and order with the registrar of the county court. That case was, it is true, decided upon s. 10 of the County Courts Act, 1867 (30 & 31 Vict. c. 142); but the language of s. 66 of the County Courts Act, 1888, is really identical for this purpose with that of the former Act. [They also cited *Driscol* v. *King*. (1)]

P. Rose-Innes, for the defendants. The Court is not bound by the case of *Welply* v. *Buhl* (2), which was decided, not upon the County Courts Act, 1888, but upon a previous Act, the terms of which were different. It is contended that under s. 66 of the Act of 1888 the action is transferred to the county court upon the order for remission becoming absolute. If this were not so, great hardship might be occasioned, for the plaintiff might make delay in lodging the writ and order with the registrar of the county court, and go on running up costs on the higher scale in the High Court. [He cited *Harris & Sons* v. *Judge* (3); *Duke* v. *Davis*. (4)]

A. L. SMITH L.J. This is an appeal from the order of a judge at chambers reversing the order of a master, by which the defendants were directed to give further and better answers to interrogatories. Previously to the making of this order by the master, an order had been made that the action should be remitted to a county court under s. 66 of the County Courts Act, 1888, unless the plaintiff gave security for costs within a certain time, which he had failed to do; but the master held that he nevertheless had jurisdiction to make the order which he made, because the writ and the order remitting the action to the county court had not been lodged with the registrar of the county court. The language of s. 66 of the County Courts Act, 1888, appears to be identical with that of s. 10 of the County Courts Act, 1867, with regard to the question involved in this case, namely, at what period of time the action is transferred from the High Court to the county court. In the case of *Welply* v. *Buhl* (2) a Divisional Court decided that under s. 10 of the County Courts Act, 1867, the action was not

(1) 49 L. T. 599.
(2) 3 Q. B. D. 80, 253.
(3) [1892] 2 Q. B. 565.
(4) [1893] 2 Q. B. 107, 260.

transferred from the superior court to the county court until the writ and the order remitting the action were lodged with the registrar. That decision was affirmed by the Court of Appeal. The language of the two sections being the same, I think that the present case is concluded by that authority. The cases of *Harris & Sons* v. *Judge* (1) and *Duke* v. *Davis* (2), upon which the defendants' counsel relied, do not touch the present question. It seems to me, therefore, that the learned judge at chambers was wrong in holding that the action was transferred from the High Court to the county court immediately upon the order made under s. 66 becoming absolute, and that consequently the master had no jurisdiction. The section requires that something more should take place before the action is so transferred, namely, that the original writ and the order remitting the action should be lodged with the registrar of the county court. No such hardship as was suggested by the defendants' counsel can be caused by this construction of the section, because the section in terms provides that the costs of all proceedings subsequent to the order for the remission of the action are to be allowed on the county court scale. For these reasons I think the appeal must be allowed.

Rigby L.J. I am of the same opinion. I can see no real distinction between this case and *Welply* v. *Buhl.* (3) The suggested hardship, namely, that the plaintiff might run up costs on the High Court scale after the making of the order, cannot arise, because s. 66 of the County Courts Act, 1888, expressly provides that the costs of the parties in respect of the proceedings subsequent to the order remitting the action shall be allowed according to the scale of costs for the time being in use in the county courts.

Appeal allowed.

Solicitor for plaintiff: *C. T. Wilkinson.*
Solicitors for defendants: *Micklem & Hollingworth.*

(1) [1892] 2 Q. B. 565. (2) [1893] 2 Q. B. 107, 260.
(3) 3 Q. B. D. 80, 253.

E. L.

1896
Jan. 25.

YATES, APPELLANT *v.* HIGGINS AND OTHERS, RESPONDENTS.

Criminal Law—Cruelty to Animals—"Domestic Animal"—Tame Seagull—Cruelty to Animals Act, 1849 (12 & 13 *Vict. c.* 92), *ss.* 2, 29—*Cruelty to Animals Act*, 1854 (17 & 18 *Vict. c.* 60), *s.* 3.

The respondents were charged, under the Cruelty to Animals Act, 1849, s. 2, with cruelly ill-treating a tame seagull. The bird had been the property of its owner for three years, and was used by her in her business as a photographer. It was tame, and was kept in a field. One wing having been pinioned, it could not fly, but could get out of the field by going down a river. It would go to its owner when called, and feed from the hand:—

Held, that the seagull was not a "domestic animal," within the meaning of the Cruelty to Animals Acts, 1849, s. 29, and 1854, s. 3, and therefore the respondents could not be convicted.

CASE stated by justices for the Buxton Division in the county of Derby.

An information was heard by the justices, in which the appellant complained that the respondents did cruelly ill-treat and abuse a certain animal—to wit, a tame seagull.

It was proved that the seagull had been the property of one Annie Simpson for about three years, and was tame, that it was kept in a field adjoining her residence, one wing having been pinioned, and being unable to fly, but that it was able to get out of the field by going down the river, which ran through it; that it would go to Annie Simpson on being called, and feed from the hand; and that Annie Simpson, who was a photographer, had used it, together with two other similar birds, in her business.

The justices found as a fact that the respondents had been guilty of gross cruelty to the bird; but they dismissed the information upon the ground that they considered, in point of law, the facts above set forth did not prove the seagull to be a domestic animal within the meaning of 12 & 13 Vict. c. 92, and 17 & 18 Vict. c. 60, s. 3.

The question for the opinion of the Court was, whether the justices were right in law in so holding.

Colam, for the appellant. The respondents ought to be con-

victed. The seagull was sufficiently domesticated to be a "domestic animal" within the meaning of 12 & 13 Vict. c. 92, s. 29, and 17 & 18 Vict. c. 60, s. 3, so as to justify a conviction under s. 2 of the earlier Act. (1) Sect. 3 of the Act of 1854 (2) appears to have been passed for the express purpose of removing any doubt which might have been entertained as to the applicability of the earlier Act to such a case as this: *Colam* v. *Pagett*. (3) The language of the judgment of Huddleston B. in that case goes far enough to uphold the present appellant's contention. *Harper* v. *Marcks* (4) is distinguishable on the facts, because here the seagull was tame and was not confined. In that case Cave J. said (5): "You must at the least shew that the animal has been sufficiently tamed to serve some purpose for the use of man." That definition is satisfied in the present case by the finding that the owner, who was a photographer, had used the seagull in her business. [He also referred to *Aplin* v. *Porritt*. (6)]

The respondents did not appear.

VAUGHAN WILLIAMS J. I am of opinion that the justices were right in law in holding, on the facts before them, that it was not proved that the seagull referred to in the case was so domesticated as to be a "domestic animal," within the meaning of the Cruelty to Animals Acts, 1849 and 1854 (12 & 13 Vict. c. 92, s. 29, and 17 & 18 Vict. c. 60, s. 3). Whatever view we may take as to the conduct of the persons charged, we have no

(1) By the Cruelty to Animals Act, 1849 (12 & 13 Vict. c. 92), s. 2, "If any person shall cruelly beat, ill-treat, overdrive, abuse, or torture . . . any animal," he shall forfeit a penalty not exceeding 5*l*.

By s. 29, "The word 'animal' shall be taken to mean any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, hog, pig, sow, goat, dog, cat, or any other domestic animal."

(2) By the Cruelty to Animals Act, 1854 (17 & 18 Vict. c. 60), s. 3, "The words and expressions to which a meaning is affixed by 12 & 13 Vict. c. 92, and which are introduced into this Act, shall have the same meaning in this Act, and the word 'animal' shall, in the said Act and in this Act, mean any domestic animal, whether of the kind or species particularly enumerated in clause 29 of the said Act, or of any other kind or species whatever, and whether a quadruped or not."

(3) 12 Q. B. D. 66.

(4) [1894] 2 Q. B. 319.

(5) [1894] 2 Q. B. 322.

(6) [1893] 2 Q. B. 57.

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right to extend the ambit of the statutes so as to include anything to which the provisions of those statutes are not properly applicable. It cannot be contended that, in order to justify a conviction, it is sufficient merely to prove that the animal in question, being an animal which is ordinarily wild, on the particular occasion which is brought to the notice of the Court remained tame. The only fact stated in the present case, beyond the mere fact of tameness, is, that the seagull was used by its owner for the purpose of her business as a photographer. Mr. Colam, on behalf of the appellant, relied on the case of *Colam* v. *Pagett* (1), where it was held that linnets kept in captivity and trained as decoy-birds for the purpose of bird-catching were "domestic animals;" but there it was shewn that the linnets were trained to perform a particular service, which cannot be correctly asserted of the seagull in the present case. The decision in *Harper* v. *Marcks* (2), where it was held that performing lions, kept in a cage, were not "domestic animals," within the meaning of the same Acts, is a strong authority against the contention put forward on behalf of the present appellant. For these reasons I have come to the conclusion that, on the facts stated in the present case, this seagull was not sufficiently tamed to be a "domestic animal," within the meaning of the Acts of Parliament, and therefore the justices were right in dismissing the information, and our judgment must be in favour of the respondents.

WRIGHT J. I am of the same opinion. There is the greatest possible difficulty in adopting any precise definition of what should be held to come within these Acts, without, at the same time, interfering with cases in which a certain amount of pain is unavoidably inflicted in the course of the necessary operations of life.

Judgment for the respondents.

Solicitor for appellant: *Sydney G. Polhill.*

(1) 12 Q. B. D. 66.

(2) [1894] 2 Q. B. 319.

P. B. H.

HODDINOT (SURVEYOR OF TAXES), APPELLANT; THE HOME AND COLONIAL STORES, LIMITED, RESPONDENTS. 1896 *Jan.* 14.

Revenue—Inhabited House Duty—House "let in different Tenements"—The Customs and Inland Revenue Act, 1878 (41 & 42 *Vict. c.* 15), *s.* 13.

By s. 13 of the Customs and Inland Revenue Act, 1878, where any house, being one property, "shall be divided into, and let in, different tenements," and any of such tenements are occupied solely for the purposes of any trade or business, or are unoccupied, the person chargeable as occupier of the house shall be entitled to exemption from inhabited house duty in respect of any tenements so occupied for purposes of trade or business, or unoccupied.

The respondents, being lessees of a house, divided it into two tenements, one of which they occupied solely for the purposes of their trade, and the other they sub-let to a person who used it as his residence. Having been assessed to inhabited house duty for the whole house, they claimed exemption in respect of the tenement occupied by themselves:—

Held, that s. 13 did not apply to exempt them:

By Wright and Kennedy JJ., because the enactment required that the tenement in respect of which exemption was claimed should be let as a different tenement, and the tenement occupied by the respondents was not so let:

Also, by Kennedy J., because the enactment only applied where the whole house was let in different tenements, and did not apply where a landlord let part of it in different tenements and retained the other part himself.

CASE stated under 43 & 44 Vict. c. 19, by the Commissioners of Income Tax and Inhabited House Duty for the division of Finsbury, in the county of Middlesex.

The Home and Colonial Stores, Limited, appealed to the commissioners against an assessment to the inhabited house duty made upon their premises, No. 152, Stroud Green Road, for the year ending April 5, 1895.

The following facts were admitted or proved at the hearing of the appeal:—

The Home and Colonial Stores, Limited, is a company with a registered office at Paul Street, Finsbury, and having branches at various places in London and the provinces. No. 152, Stroud Green Road has a shop and parlour on the ground floor

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with a side door and passage from the street, and two floors over. Two doorways originally gave access from the parlour to the passage. The passage has a staircase leading to the upper floors. The company use the shop and parlour on the ground floor as a branch establishment to carry on their business as retail grocers and provision dealers, and occupy them solely for the purposes of their business. The premises are held in their entirety by the company on lease at a rental of 80*l.* per annum; but, having no use for the upper portion of the house, the company caused the doors of communication between the shop and parlour and the passage leading to the staircase to be barred and screwed up, and on the shop side of the door tiers of boxes were raised, previously to the letting of the upper part of the house. The upper part of the house, consisting of the two floors aforesaid and having no communication with the company's business premises, and the sole right to use the side door, passage and staircase, are sub-let by the company to a tenant at the weekly rent of 15*s.* inclusive of rates and taxes. The sub-tenant is not in the employment of, or connected with the company. He has separate sanitary arrangements, and there is no common user thereof. Notice in writing, stating the facts as required by statute, was duly given to the surveyor of taxes of the district.

The respondents claimed exemption from the duty in respect of the tenement occupied by them.

The commissioners reduced the assessment to the annual value of the upper part of the premises, and discharged the remainder of the assessment; whereupon the surveyor duly required them to state a case.

Sir Richard Webster, A.-G. (*Danckwerts* with him), for the Crown. The respondents are the lessees and occupiers, by themselves and their sub-tenant, of the whole house, and are therefore liable to pay inhabited house duty for the whole, unless they can bring themselves within some statutory exemption. (1) They are not exempted by rule 6, Sched. B, of 48 Geo. 3,

(1) By 14 & 15 Vict. c. 36, duties are granted upon inhabited houses, and all the powers and provisions of former Acts with reference to inhabited house duty are to be in force. 48 Geo. 3, c. 55, Sched. B, contains

c. 55, because the house is not let in different tenements by their superior landlord; nor by rule 14, because the tenements are not distinct properties: *Attorney-General* v. *Mutual Tontine Westminster Chambers Association*. (1) The respondents' occu-

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the following rules (inter alia) for charging the duties made payable on all inhabited dwelling-houses throughout Great Britain:—

Rule 1: "The . . . duties to be charged annually on the occupier or occupiers for the time being of every such dwelling-house," above a specified value.

Rule 3: "All shops and warehouses which are attached to the dwelling-house, or have any communication therewith, shall in charging the said duties be valued together with the dwelling-house and the household and other offices aforesaid thereunto belonging. . . ."

Rule 6: "Where any house shall be let in different stories, tenements, lodgings, or landings, and shall be inhabited by two or more persons or families, the same shall nevertheless be subject to and shall in like manner be charged to the said duties as if such house or tenement was inhabited by one person or family only, and the landlord or owner shall be deemed the occupier of such dwelling-house, and shall be charged to the said duties. . . ."

Rule 14: "Where any dwelling-house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same was an entire house, which duty shall be paid by the occupiers thereof respectively."

The Customs and Inland Revenue Act, 1878 (41 & 42 Vict. c. 15), s. 13: "With respect to the duties on inhabited houses . . . . the following provisions shall have effect:

"(1.) Where any house, being one property, shall be divided into, and let in, different tenements, and any of such tenements are occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, or are unoccupied, the person chargeable as occupier of the house shall be at liberty to give notice in writing, at any time during the year of assessment, to the surveyor of taxes for the parish or place in which the house is situate, stating therein the facts; and after the receipt of such notice by the surveyor, the commissioners acting in the execution of the Acts relating to the inhabited house duties shall, upon proof of the facts to their satisfaction, grant relief from the amount of duty charged in the assessment, so as to confine the same to the duty on the value according to which the house should, in their opinion, have been assessed, if it had been a house comprising only the tenements other than such as are occupied as aforesaid, or are unoccupied:"

"(2.) Every house or tenement which is occupied solely for the purposes of any trade or business, or of any profession or calling by which the occupier seeks a livelihood or profit, shall be exempted from the duties by the said commissioners upon proof of the facts to their satisfaction, and this exemption shall take effect although a servant or other person may dwell in such house or tenement for the protection thereof."

(1) L. R. 10 Ex. 305; 1 Ex. D. 469.

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pation of the ground floor for business purposes brings them within rule 3, and is an occupation in respect of which they are liable to the duty for the whole house. Further, they are not exempted by s. 13 of the Customs and Inland Revenue Act, 1878. To satisfy that section the house must be both divided into, and let in, different tenements: *Yorkshire Fire and Life Insurance Co.* v. *Clayton.* (1) The division must be of a permanent structural character; a mere temporary adaptation of the premises—such as was effected here by barring and screwing up doors and piling up boxes—is not sufficient. The expressions used by the Court in the last-mentioned case, and by Huddleston B. in *Chapman* v. *Royal Bank of Scotland* (2), and by the Lord President in *Russell* v. *Coutts* (3), shew that a structural division is intended. The words, "let in different tenements," in s. 13 of the Act of 1878, and also in rule 6 of Sched. B of 48 Geo. 3, c. 55, are meant to limit the exemption to cases in which the whole house is let, or intended to be let, in different tenements; they do not apply where, as here, the landlord himself retains and occupies one of the tenements. That opinion was expressed by Lindley J. in *Yorkshire Insurance Co.* v. *Clayton* (4), and by Huddleston B. in *Chapman* v. *Royal Bank of Scotland.* (5) *In re Cowan and Strachan* (6) is an authority for the proposition that the occupier of a shop who lets the rest of the house to a tenant is not exempt under s. 13. The ground floor here has not been "let" as a different tenement by anybody.

R. M. Bray (*Clarke Williams* with him), for the respondents. The respondents are entitled to the exemption provided by s. 13 of the Customs and Inland Revenue Act, 1878. There was a sufficient division of the house into different tenements to satisfy the statute. As pointed out by Hawkins J. in *Chapman* v. *Royal Bank of Scotland* (7), no particular mode of division is essential, provided there is, as there was here, an actual division into different tenements. Sect. 13 has superseded rule 6 of

(1) 6 Q. B. D. 557; 8 Q. B. D. 421.
(2) 7 Q. B. D. 136, at p. 140.
(3) 1 T. C. 469, at p. 474; 19 Sc. L. R. 197.
(4) 6 Q. B. D. 557, at pp. 560, 561.
(5) 7 Q. B. D. 136, at p. 141.
(6) 1 T. C. 245; 17 Sc. L. R. 314.
(7) 7 Q. B. D. 136, at p. 144.

Sched. B. of 48 Geo. 3, c. 55, the intention of the Legislature being that where a house was divided into, and capable of being let in, different tenements, any tenement used exclusively for business purposes should be exempted from duty. Grove J. in *Yorkshire Insurance Co.* v. *Clayton* (1), and Hawkins J. in *Chapman* v. *Royal Bank of Scotland* (2), did not agree with the view of Lindley and Huddleston JJ. in the same cases, namely, that s. 13 does not apply where the landlord himself retains and occupies one of the tenements. The Court in *Yorkshire Insurance Co.* v. *Clayton* (3) expressly did not decide that point. Later decisions in the Scottish Courts support the contention for the respondents: *Nisbet* v. *McInnes, Mackenzie, and Locheard* (4); *Corke* v. *Brims* (5); *Allan* v. *Thomson* (6); *Smiles* v. *Crooke* (7); *Allan* v. *Miller.* (8)

Sir Richard Webster, A.-G., replied.

WRIGHT J. In this case there was a house which was a dwelling-house, and inhabited as a dwelling-house. The respondents, desiring to take the benefit of the exemption contained in s. 13 of the Customs and Inland Revenue Act, 1878, barricaded off the upper portion, which was, properly speaking, the inhabited part, and kept for themselves the other part of the building which they desired to use as a shop, and they let the upper part to a tenant paying a weekly rent. The question is whether they are within the exemption in respect of the part which they use as a shop. The liability to inhabited house duty depends in the first place upon 14 & 15 Vict. c. 36, which fixes the amount to be paid on inhabited houses, and enacts that the provisions of former Acts shall be applicable. The former Acts which are applicable are, first, the 43 Geo. 3, c. 161, which, by s. 10, provides that every dwelling-house shall be brought into charge, and next the 48 Geo. 3, c. 55, Sched. B, which contains rules for charging the duties made payable on all inhabited houses. The first rule says that the

(1) 6 Q. B. D. 557, at p. 559.
(2) 7 Q. B. D. 136, at p. 145.
(3) 6 Q. B. D. 557; 8 Q. B. D. 421.
(4) 2 T. C. 55; 21 Sc. L. R. 740.
(5) 1 T. C. 531; 20 Sc. L. R. 778.
(6) 21 Sc. L. R. 741.
(7) 2 T. C. 162; 23 Sc. L. R. 489.
(8) 2 T. C. 446; 26 Sc. L. R. 491.

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duties are to be charged annually upon the occupier or occupiers. By rule 3, all shops and warehouses which are attached to the dwelling-house, or have any communication therewith, shall, in charging the duties, be valued together with the dwelling-house. I pass by rule 6 for the moment in order to dispose of rule 14, which is clearly not applicable to the present case, because it applies only where the different tenements in the dwelling-house are distinct properties. Rule 6 is the only rule which provides for different parts of a house being let in different tenements. [The learned judge read the rule.] So the law stood until the Act of 1878 was passed. If it still stood there, it seems to me plain that the respondents would have been liable to the duty which the Crown claims. They were occupiers of that which was an inhabited dwelling-house. By rule 3 the part used as a shop was to be valued together with the inhabited part, and, as it seems to me, rule 6 would have been inapplicable. Whether or not rule 6 means, "where the whole house shall be let in different stories, tenements, &c.," it is unnecessary to decide, and I do not decide; but it does require that there shall be more than one set of inhabitants in order for it to apply at all. The words are, "where any dwelling-house is or shall be let in different stories, tenements &c., and shall be inhabited by two or more persons or families." In any view the respondents would have been liable—either notwithstanding the rule because it did not apply, or by virtue of the rule because, if it did apply, they were to be deemed the occupiers. Then comes the Act of 1878. Sect. 13 provides that "where any house, being one property, shall be divided into, and let in, different tenements, and any of such tenements are occupied solely for the purposes of any trade or business . . . . or are unoccupied," the person chargeable as occupier shall be charged duty only according to the value at which the house should have been assessed if it had not comprised the tenements so occupied for trade or business purposes or unoccupied. It is alleged by the Crown in the present case that the house in question has not really been divided in any sufficient sense—the facts being, in substance, that the doors of communication have been barred and screwed up, and other measures taken to prevent communica-

tion between the two parts. In my judgment, it is not necessary absolutely to decide whether there was a sufficient division here. Some of the expressions of the judges in *Yorkshire Insurance Co.* v. *Clayton* (1) no doubt indicate that there must be what is called a "structural" division—whatever that is. For myself I should think such a division as existed in the present case might be sufficient. I cannot see that a division made by a carpenter's work may not be just as effectual as one made by a builder's work. I certainly, therefore, should not be inclined to decide this case in favour of the Crown on that point. But then there comes another question. There has been a difference of judicial opinion as to whether s. 13 has any application so long as the lessor remains in occupation of any part of the house. It is very difficult to discover the real meaning of the Legislature on this subject. For myself I am inclined to think, with some of the judges who have expressed an opinion upon it, that s. 13 ought to be construed according to its strict literal meaning, namely, where the whole of the house, being one property, is altogether divided into, and altogether let in, different tenements. I am inclined also to think that the true meaning of rule 6 of Sched. B of 48 Geo. 3, c. 55, to which s. 13 is to some extent a rider, is, "where the whole of the house shall be let in different stories, tenements," &c. But I do not think it is necessary here to absolutely decide that question, though if the view I have indicated, which has also been the view of some of the judges, be right, it would be sufficient to decide this case in favour of the Crown. What strikes me as the real substance of the case is this: Here is a building which is a dwelling-house and inhabited by somebody. The respondents actually occupy a part of that building, though not the part which is actually inhabited. But if the building is an inhabited dwelling-house, and they substantially occupy the house, I think they are liable to the duty unless they bring themselves within the terms of the exemption. Now, looking closely at the language of the exemption, I think it cannot be applied to this case. The words "let in different tenements"

(1) 6 Q. B. D. 557; 8 Q. B. D. 428.

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appear to mean let to different persons by the general lessor; they do not include a case where, as here, the general lessor has let the whole of the premises to a tenant, and that tenant sublets a part and occupies the rest himself. If the section be read as if it referred to the letting by the superior landlord, it does not apply, because he has not divided the house into, nor let it in, different tenements; he has let it all as one tenement to the respondents. If the section be read as referring to the inferior landlords, the respondents, it cannot be applied without doing violence to its language, because the respondents have not let, or tried to let, the shop and room on the ground floor at all, and it is only to a separate tenement which has been let, or tried to be let, for the purposes of trade or business, or is unoccupied, that the section applies. I am of opinion, therefore, that the Crown is entitled to our judgment.

KENNEDY J. I agree that the Crown is entitled to succeed in this case. [The learned judge stated the facts.]

With respect to the question whether there was a sufficient division of the house into different tenements I express no opinion, because it is not necessary; but I am not disposed to say that there might not be a sufficient division within s. 13 of the Act of 1878 by doing what the respondents have done here. I will assume that there was a sufficient division of the house into separate tenements. But, assuming that against the Crown, I certainly am of opinion that the case is not brought within either Sched. B, r. 6, of 48 Geo. 3, c. 55, or s. 13 of the Act of 1878. I think, in accordance with the clear and definite opinion of Lindley J. (as he then was) in *Yorkshire Insurance Co.* v. *Clayton* (1), and in accordance with the view which Huddleston B. seems to have been inclined to take in *Chapman* v. *Royal Bank of Scotland* (2), that neither the rule nor the section is applicable in the case of a person who does not become liable to inhabited house duty as occupier by reason of his letting out the whole of the building. Speaking for myself, it seems to me that s. 13 certainly only applies where

(1) 6 Q. B. D. 557; 8 Q. B. D. 428. (2) 7 Q. B. D. 136.

the whole building is let in different tenements, and that, where the landlord retains part of the premises for himself, the case is not within the section. Lindley J., in *Yorkshire Insurance Co.* v. *Clayton* (1), said: "I do not think the clause applies to a case where a landlord occupies any part of the house, not as a caretaker, which might bring him within the second sub-section, but for the purposes of residence or business. The difficulty about the word 'let' is obvious, but we must read the section in such a way as to give it a sensible effect. It contemplates the house being divided into tenements, some of which are let for business purposes or are unoccupied. They may be let, and some of the lessees may not have taken possession; but what I think is meant is this—that if the house is let, that is to say, intended to be let, habitually let, sub-s. 2 would apply, but not to the case of a house not intended to be let in its entirety, and in which some of the property is occupied by the landlord." I am of opinion, therefore, that s. 13 is not applicable to the circumstances of this case. I go a step further. Assume that the section may apply to a case in which the premises have been divided into different tenements, and the landlord retains a part himself and lets a part to somebody else. Now, the claim of exemption here is a claim made by the landlords, the respondents, to be exempted from payment of inhabited house duty as regards the part they have retained for themselves. They ask to be exempted, not in respect of the portion they let, but only in respect of the portion they retain. I think they are clearly not within s. 13 for the reason given by my brother Wright. The facts shew that the part retained by the respondents is not let as a different tenement; it was retained by them, and has never been let as a different tenement; it only came into their occupation as being part of the whole house which was let to them. It is, therefore, not one of "such tenements" within the meaning of s. 13, because the words "any of such tenements" clearly mean a tenement which has not only been divided from the other tenement or tenements in the house, but has itself been let as a different tenement. I am of opinion, therefore, that the respondents are not entitled to

(1) 6 Q. B. D. 557, at pp. 560, 561.

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the benefit of the exemption in s. 13, and that our judgment should be for the Crown.

Judgment for the Crown.

Solicitor for appellant: *The Solicitor of Inland Revenue.*
Solicitors for respondents: *Slaughter & May.*

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[IN THE COURT OF APPEAL.]

SMITH *v.* SOUTH EASTERN RAILWAY COMPANY.

Negligence—Railway Company—Level Crossing—Gatekeeper's Duty—Contributory Negligence.

The plaintiff's husband was run over and killed by a train of the defendants under the following circumstances. The defendants' line crossed a public highway on the level. There was a gatekeeper's lodge near the crossing, where a servant of the defendants was stationed, whose duty under the company's regulations was to attend to the carriage gates at the crossing, and, whenever a train was approaching, to stand by the rails and, if the line was clear, exhibit as a signal a white flag by day or a white light by night. There were lamps on the carriage gates which shewed, when they were closed across the highway, a white light, and, when they were closed across the line, a red light. The deceased, who lived near the crossing on the other side of the line, called at the gatekeeper's lodge between 8 and 9 o'clock on a December night to inquire whether his wife was there, and found the gatekeeper sitting in his lodge reading. Being told that his wife was not there, he left the lodge. Though a train had been signalled, the gatekeeper gave him no warning and did not go out to signal the train. The deceased attempted to cross at the level crossing, and was caught by the train and killed. The train carried lights which were visible by any one about to cross at the level crossing for a distance of more than 600 yards. The engine-driver whistled ten seconds before the train passed over the crossing, which it did at the rate of from thirty-five to forty miles an hour. The engine-driver stated in evidence that, when approaching the crossing, he saw the white light on the carriage gates, but did not receive any hand-signal from the gatekeeper:—

Held, in an action by the plaintiff under Lord Campbell's Act to recover damages in respect of her husband's death, that there was upon the above facts evidence to go to the jury of negligence on the part of the defendants by which, and not by any negligence on his own part, the death of the plaintiff's husband was caused, and therefore the judge at the trial was right in not withdrawing the case from the jury.

APPLICATION for new trial or judgment in an action tried before Day J. with a jury.

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The action was brought under Lord Campbell's Act by the plaintiff, as widow and administratrix of Thomas Clarke Smith, deceased, on behalf of herself and her two children, to recover damages in respect of her husband's death, which she alleged to have been caused by the negligence of the defendants.

The facts were as follows. The deceased man had been run over and killed by an up-train of the defendants on a level crossing where their line crossed a public highway. At this crossing there were on each side of the line a gate, by which the road for vehicles was opened or closed, and a wicket gate for foot-passengers. There were lamps upon the carriage gates which, when they were opened for the passage of vehicles and closed across the line, shewed a red light up and down the line, but, when they were closed across the road for vehicles and open for the passage of trains, shewed a white light. There was a gatekeeper's lodge at the crossing on the down side of the line, where a man named Judges was stationed, whose duty it was to open and shut the carriage gates as might be necessary. It was also his duty, under the regulations of the company, whenever a train was approaching the crossing, to see if the line was clear, and to stand by the side of the rails in such a position as to be conspicuous both to the engine-driver and guard of the train, and, if the line was clear, to hold out a white flag by day, or a white light by night. There was evidence that the lights of an approaching up-train would be visible to a person crossing the line at the level crossing, before getting on to the rails, for a distance of more than 600 yards, and that the view along the line in the other direction was clear for about a mile and a quarter. Between 8 and 9 o'clock on a dark but clear night in December the deceased, who lived in a cottage adjacent to the railway on the up-side of the line, came to the gatekeeper's lodge on the down-side and asked whether his wife was there. The gatekeeper was then sitting in his lodge reading. The approach of a train on the up-line had just been signalled by the bell in the gatekeeper's lodge. On being told that his wife was not there, the deceased left the lodge. The gatekeeper did not warn him that a train was coming, and did not go out to signal

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the train. It appeared that the deceased must have then attempted to go over the crossing and been caught by the train on the up-line and killed, his body being found on the rails after the train had passed. It was admitted that the engine carried the usual lights. The whistle of the engine was sounded about ten seconds before the train crossed the level crossing, which it did at a speed of from thirty-five to forty miles an hour. The engine-driver stated in evidence that on approaching the crossing he saw the white light on the carriage gates, but did not receive any hand-signal from the gatekeeper. The jury found a verdict for the plaintiff with 200*l.* damages for the wife and 200*l.* damages for each of the children.

Willis, *Q.C.*, and *W. R. Peel* (*W. O. Willis* with them), for the defendants. The learned judge ought to have withdrawn the case from the jury on the ground, first, that there was no evidence of any negligence on the part of the defendants; and, secondly, that, if there was such evidence, there was no evidence of any negligence on their part by which the accident was caused. This was not a crossing where special circumstances rendered exceptional precautions necessary, as was the case in *Bilbee* v. *London, Brighton and South Coast Ry. Co.* (1) The view along the line was clear for a distance of more than 600 yards. The engine-driver whistled before coming to the crossing; and, if the deceased had used any care, he would have heard the noise and seen the lights of the approaching train long before it reached the crossing. There was no duty cast upon the defendants by statute or at common law to employ a gatekeeper to look after the safety of foot-passengers at the crossing: *Cliff* v. *Midland Ry. Co.* (2); *Stubley* v. *London and North Western Ry. Co.* (3) The gatekeeper was not stationed there for the purpose of looking after foot-passengers, but of attending to the carriage gates and also of signalling to the drivers of trains that the line was free from obstructions to the passage of the train. His duty in that respect was to the company, not to the public. The fact that he was employed

(1) 18 C. B. (N.S.) 584. (2) L. R. 5 Q. B. 258.
(3) L. R. 1 Ex. 13.

for those purposes cannot enhance the duty of the defendants to foot-passengers: *Skelton* v. *London and North Western Ry. Co.* (1)

The onus lies on the plaintiff of shewing that the defendants' negligence caused the accident; and therefore, if, on the evidence for the plaintiff, it is clear that the accident was occasioned by the negligence of the deceased himself, or if the evidence is equally consistent with the view that the accident was so caused as with the view that it was occasioned by the defendants' negligence, the plaintiff has failed to sustain the onus of proof which she must sustain in order to make out a cause of action, and there is no evidence to go to the jury: *Cotton* v. *Wood* (2); *Wakelin* v. *London and South Western Ry. Co.* (3) Absence of contributory negligence is an essential part of the cause of action, and therefore the plaintiff ought to give some evidence of it. In the present case, to say the least, the evidence for the plaintiff is equally consistent with the view that the accident was caused by the negligence of the deceased man in not looking out for the train, or recklessly endeavouring to cross in front of it as with the view that it was caused by any default of the defendants.

[They also cited *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (4); *Ellis* v. *Great Western Ry. Co.* (5); *Williams* v. *Great Western Ry. Co.* (6); *Stapley* v. *London, Brighton and South Coast Ry. Co.* (7); *Davey* v. *London and South Western Ry. Co.* (8)]

Crispe and *Bassett Hopkins* (*G. K. T. Purcell* with them), for the plaintiff, were not called upon.

LORD ESHER M.R. In this case it is contended for the defendants that the judge at the trial ought to have held as a matter of law that there was no evidence of negligence on the part of the defendants, or, if there was, that there was no evidence of the exercise of reasonable care on the part of the

(1) L. R. 2 C. P. 631.
(2) 8 C. B. (N.S.) 568.
(3) 12 App. Cas. 41. See also note at the end of this case.
(4) 3 App. Cas. 1155.
(5) L. R. 9 C. P. 551.
(6) L. R. 9 Ex. 157.
(7) L. R. 1 Ex. 21.
(8) 12 Q. B. D. 70.

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deceased man; and that the judge ought therefore to have non-suited the plaintiff, or to have directed a verdict for the defendants. Many nice questions of law were argued in this case which I do not think it necessary to decide; for, assuming that all the legal propositions contended for by the defendants were correct—which I must not be taken to admit—in my opinion it is clear that upon the facts proved in evidence in this case the judge could not have withdrawn the case from the jury. It seems to me that the main stress of the argument for the defendants was with regard, not so much to the question whether there was evidence of negligence on the part of the defendants, as to the question whether there was contributory negligence on the part of the deceased. On whomsoever the burden of proof may lie, it cannot be doubted that, although the defendant has been guilty of negligence, if the person to whom the accident has happened was also guilty of contributory negligence, no action can be maintained. That proposition may be expressed in various ways. It may be said that it is not made out that the defendant's negligence was the sole cause of the accident, or that the negligence of the defendant was not the cause of the accident, because it was caused by the joint negligence of the defendant and the person to whom the accident happened. The question in this case seems to reduce itself to this: Could the judge properly have directed the jury as a matter of law that negligence on the part of the deceased was proved? It is an admitted proposition of law that, if there is no evidence of some material fact which forms an essential part of the plaintiff's case, then the judge is bound to withdraw the case from the jury. What are the facts in this case with regard to the question whether there was negligence on the part of the deceased? It appears that there was a level crossing over the defendants' line which was a highway both for carriages and foot-passengers. There were two gates on each side of the line, one a wide gate though which carriages and carts went, the other a smaller gate for foot-passengers, through which they could go, although the carriage gate was shut. There was evidence that on the occasion in question the plaintiff's husband had come over the crossing to the house of Judges, the gatekeeper, to ask if his

wife was there; that he found the gatekeeper sitting in his house reading; that he was told that his wife was not there; and thereupon he left the cottage, and immediately attempted to go back over the crossing towards the other side of the line. It is not disputed that the man Judges had a duty to perform, and there was evidence for the jury that his duty was, whenever a train, either by day or night, was about to pass over the level crossing, to come out and exhibit a signal for the guidance of the driver of the engine. There was evidence that that was what he habitually did, though there was also evidence that sometimes he did not do so. It is immaterial for the purpose for which I use this fact whether that was a duty to the general public or only to the railway company. The deceased man lived in the neighbourhood, and had been at the crossing on previous occasions. I think there was evidence from which the jury might infer that he knew that Judges had to perform the services which I have mentioned for the company, whenever a train was passing over the crossing; and, that being so, they might, on the evidence, take the view that, under the circumstances, it was not a want of reasonable care on the part of the deceased to presume that, as Judges remained in his house, no train was coming, and therefore he might go over the crossing in safety without taking the precaution of looking up and down the line, or any other such precaution as might otherwise be necessary. If that be so, there was evidence for the jury upon the question whether there was any want of reasonable care on his part. In saying this, I think I am acting on the view expressed by Lord Cairns in the case of *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery*. (1) He seems in that case to have thought that, if a man had a right to suppose from his knowledge of the practice at the station that an approaching train would whistle, the jury might come to the conclusion that the absence of whistling had thrown him off his guard, and had produced in him a state of mind in which he might not unreasonably suppose that it was unnecessary for him to look out before crossing to see whether a train was coming. So here, I think, in the case of a man who knew the

(1) 3 App. Cas. 1155.

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practice at the crossing, the jury might say that the fact that the signalman remained in his house produced in his mind a sense of security which would prevent its being a want of reasonable care not to look up and down the line to see whether a train was coming. Therefore, without entering into all the questions which have been discussed during the argument, I think the considerations which I have mentioned are sufficient to determine this case, and to entitle the judge at the trial to decline to withdraw the case from the jury. For these reasons I think the application must be dismissed.

LOPES L.J. The question resolves itself into this, namely, whether the learned judge was right in letting the case go to the jury. It was said that he ought to have withdrawn the case from them on the ground, first, that there was no evidence of any negligence on the part of the defendants; and, secondly, that, if there was any such evidence, there was no evidence of any negligence which caused the death of the plaintiff's husband, because the evidence shewed that it was as much attributable to his own negligence as to that of the defendants. Very interesting questions of law were raised during the argument, upon which I think it unnecessary to express any opinion. The state of the law on the subject does not appear to me to be altogether satisfactory; but I am satisfied in the present case to say that the plaintiff in an action of this kind must give evidence of negligence causing the damage in respect of which the action is brought. In dealing with this case, I do not think it necessary, and I do not intend, to express any opinion in the abstract as to what the duty of a signalman stationed by a railway company at a level crossing may be, and whether it is a duty to his employers only or also to foot-passengers. I propose only to deal with the circumstances of this particular case.

It was undoubtedly the defendants' duty, by their servants, to use reasonable care and to take proper precautions in the management of their railway at the spot in question. They seem to me in this case to have determined for themselves what such precautions were. They placed a man at the crossing,

with directions to signal each train as it passed. I presume from their giving those directions that they conceived this to be a necessary precaution to take. I think, if that be so, that it might reasonably be said that this precaution was taken as a warning not only to the engine-driver, but also to the general public, including not only those who might be crossing the line in carts and carriages, but also those on foot. On the night in question a man named Judges was stationed at the crossing. It being his duty to go out and signal the approaching train, he remained in his lodge, and did not signal the train. The railway company were bound to use reasonable care with regard to the crossing, and they thought this a reasonable and proper precaution to take. Their servant failed to take that reasonable and proper precaution, and, he being the servant of the company, they are responsible for his default. It seems to me that there was evidence for the jury on the question whether the defendants had used proper care and precaution with regard to the management of their railway at this crossing.

Then it was said that this case fell within the authority of *Wakelin* v. *London and South Western Ry. Co.* (1), because the circumstances under which the deceased came by his death were not known, and that the evidence given for the plaintiff was at the best equally consistent with the death of the plaintiff's husband having been caused by his own negligence as with its having been caused by the defendants' negligence. It was said that the train carried lights, that it could be seen more than 600 yards off, and that the driver sounded his whistle; and, therefore, that the deceased man must have been guilty of contributory negligence by reason of the reckless way in which he crossed the line. Of course, if that could be established, the argument which the defendants' counsel based upon *Wakelin* v. *London and South Western Ry. Co.* (1) might be sustained. The question is whether on this point the case could have been withdrawn from the jury. Can it be said that the evidence was equally consistent with the view that the death of the plaintiff's husband was caused by his own negligence as with the view that it was caused by the defendants'

(1) 12 App. Cas. 41.

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negligence? I have felt some difficulty on this point; but on consideration the case strikes me in this way. The deceased appears to have known the crossing and the practice there with regard to the signalling of trains. Was it not a question for the jury whether the deceased, finding that the signalman remained sitting in his lodge and was making no attempt to signal any approaching train, might not reasonably have supposed that he could safely cross the rails without taking the precaution of looking up and down the line or listening for the whistle of a train? On consideration I have come to the conclusion that on this question there was evidence for the jury, and, if I had been trying the case, I do not think I could have withdrawn it from them. On these grounds I think the application must be dismissed.

KAY L.J. In this case, the jury having found a verdict for the plaintiff, there is an application for a new trial or judgment on the ground that there was no evidence of negligence on the part of the defendants which caused the accident to the deceased man. The facts proved by the evidence, as to which there was no dispute, were these. The deceased man was a gardener who lived in a cottage on the south side of the defendants' line of railway. There was a level crossing over the line for carriages and foot-passengers, and on the north side of the line there was a gatekeeper's lodge belonging to the railway company, at which they kept a man whose duty it was to attend to the gates, to open them when vehicles were to be allowed to cross, and to see that they were closed when a train was coming or when no vehicles were about to cross the line. It was also the duty of this man, whenever a train passed by day or by night, to go to the side of the line and, if the line was clear, to shew by day a white flag, or by night a white light. The judge in summing up said that he also had a red flag and a red lamp to exhibit as a danger signal. The defendants' counsel says that this was not proved. It is one's ordinary experience of railways that that is the usual practice; but it is not very material whether that was so or not. In any case it is clear that it was his ordinary duty, whenever a train passed at night, to go to

the side of the line, and, if the line was clear, to exhibit a white light. It was said that the only object of this was to assist the engine-driver by shewing him that the line was clear of vehicles, and that it was not done for the sake of the foot-passengers. But there was at night a lamp upon each of the carriage gates, or upon one of them, which, when those gates were opened for the passage of vehicles, would shew a red light up and down the line, and this lamp would act as a danger signal. That being so, a jury might think that it could not be for the sake of vehicles only that the man was to be by the side of the line to signal when trains passed, and they might be justified in inferring that he was to be there in order to signal that the line was clear of any kind of obstruction, either by vehicles or by people passing on foot, or by any other obstacle which might occur at a level crossing. Suppose, for example, a school of children were passing over the crossing after dark, would it not be the duty of the signalman to signal to the driver of the train that there was danger, and to prevent him from running over the children, if possible? To continue the facts. The deceased man went to the gatekeeper's lodge to ask if his wife was there. Being told that she was not, he left the lodge. The gatekeeper had at that time received a signal by bell that the train was coming; he did not tell this to the deceased man, but allowed him to leave the lodge without any warning. He did not go on the line and shew a light as was his duty. The deceased man thereupon attempted to cross the level crossing, and was struck by the train and killed. The first question is whether under those circumstances there was any evidence of negligence on the part of the defendants.

The defendants, by the directions they gave, themselves acknowledged it to be their duty to have a man by the crossing to signal with a flag or a lamp whenever a train was passing. The learned judge in summing up said that he attributed no blame to the engine-driver. I do not know whether the jury would necessarily agree in that view, for the engine-driver said that he did observe that the signalman was not at the crossing, and therefore he must have observed that the white light, which could have been seen a long way off, was not shewn. What

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might the jury fairly think the duty of the driver to have been under those circumstances? If the gatekeeper had no red light as alleged, the absence of the white light would be a danger signal. Although the driver missed the white light, he nevertheless proceeded at the rate of forty miles an hour. Might not the jury reasonably think that that was some evidence of negligence? Then, again, the default of the gatekeeper could not be denied. It was said that his duty had no relation to persons passing on foot. It seems to me that, when a man is placed as he was, with the duty of signalling that the line is clear, this precaution is taken as much for the safety of foot-passengers as for that of carriages or of the train. At any rate, I think the jury would have a right to draw the inference that this was so. Therefore I think that there was evidence for the jury of negligence on the defendants' part.

Then it was said that the facts were equally consistent with the accident having been due to want of care on the part of the deceased man himself as with its having been caused by the defendants' negligence, and, where that is so, the law is that the judge ought to hold that there is no question for the jury to decide. I venture to say, with all respect for those who hold a different opinion, that as long as we have trial by jury and juries are judges of the facts, it should be a very exceptional case in which the judge could so weigh the facts and say that their weight on the one side and the other was exactly equal. There may be such cases, and the House of Lords seems to have considered that there might be. I can only say that I think they must be very rare, and I certainly do not think that the present case is one of them. I quite agree with the view taken by the Master of the Rolls and my brother Lopes that the deceased man, who was familiar with this crossing, might be supposed to know what the gatekeeper's duties were; and the inference might reasonably be drawn that he was misled by the gatekeeper's neglect of his duty, and so did not take the precautions which he would otherwise have taken. It was said that the engine-driver whistled. But he only began to whistle ten seconds before he came to the crossing. It seems to me that all these matters were for the jury to consider. I do not think

that the judge would have been justified in withdrawing the case from the jury on the ground that the evidence was equally consistent with the accident having been caused by the deceased man's negligence as with its having been caused by the defendants' negligence. On these grounds I think that the application for a new trial fails.

I wish to guard myself against being supposed to concur in the view that, in order to establish his cause of action, it is the plaintiff's duty to shew that he was not guilty of contributory negligence. I am disposed at present to think that it is not so; a party is not ordinarily bound to prove a negative, and contributory negligence seems to be rather a defence to the action; but I observe that there is some conflict of authority on the point, and I wish to reserve my judgment on that question.

Application dismissed.

Solicitor for plaintiff: *Edward Clarke.*
Solicitor for defendants: *A. Willis.*

E. L.

NOTE.—It was suggested by the Master of the Rolls that it would be convenient to the profession that the judgments delivered in the case of *Wakelin* v. *London and South Western Ry. Co.* (12 App. Cas. 41) in the Court of Appeal should be appended to the case above reported.

The facts in that case are stated in the report of the case in the House of Lords, and may be summarised as follows. The action was brought under Lord Campbell's Act by the widow and administratrix of H. Wakelin against the defendants to recover damages in respect of the death of her husband, which she alleged to have been caused by the defendants' negligence. The defendants' line crossed a public footpath on the level, the approaches to the crossing being guarded by hand-gates. A watchman who was employed by the defendants to take charge of the gates and crossing during the day was withdrawn at night. The dead body of the plaintiff's husband was found on the line near the crossing at night, he having been killed by a down-train, which carried the usual head-lights, but did not whistle to give warning of its approach to the crossing. There was evidence that an approaching down-train could have been seen by a person standing by the side of the down-rails for a distance of nearly half a mile. No evidence was given of the circumstances under which the deceased got upon the line. The jury having found a verdict for the plaintiff, a Divisional Court set it aside and entered judgment for the defendants. On appeal by the plaintiff to the Court of Appeal, the following judgments were delivered:—

BRETT M.R. In the present case an action has been brought against a

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railway company in respect of the death of a relative of the plaintiff, on the ground that his death was caused by their negligence. It is asserted that there was no evidence to go to the jury in support of the cause of action which the plaintiff alleges. To decide whether that is so, it is necessary to consider what that cause of action is. It is not a cause of action according to the law of England that the death of the deceased person was caused by the negligence of the railway company in the sense that their negligence was *a* cause of his death. In an action for personal injuries through negligence, although it is shewn that there was negligence of the defendants which was *a* cause of the accident, and without which it could not have happened, yet, if the plaintiff himself was also guilty of negligence or want of reasonable care which contributed to the accident, so that the accident was the result of the joint negligence of the plaintiff and the defendants, there is no cause of action. The cause of action is, that, as between the plaintiff and the defendant, the accident or injury to the plaintiff was caused solely by the negligence of the defendant. Therefore, in order to make out the cause of action, it must not only be shewn that the negligence of the defendant was *a* cause, but that, as between the plaintiff and the defendant, it was the sole cause, i.e., that the accident was caused by the negligence of the defendant without any negligence of the plaintiff contributing to it. The plaintiff's cause of action being that the accident to him was caused solely, as between him and the defendant, by the negligence of the defendant, he must give primâ facie evidence of that cause of action. If he omits to give primâ facie evidence of any material part of his cause of action, he must be non-suited. If therefore the negation of any contributory negligence on his part be a part of his cause of action, and a necessary part, then it would seem to follow that he must give some evidence of that negative. In my opinion it is because that negative was part of the plaintiff's cause of action, that under a plea of not guilty to any action of negligence, a plea of not guilty being merely a traverse of every necessary allegation on the part of the plaintiff of his cause of action, the question of contributory negligence could be raised. If under that traverse the plaintiff gave primâ facie evidence of a want of contributory negligence on his part, the defendant might give affirmative evidence that he was negligent, and then you had a conflict of evidence; but although the plaintiff had given in the first instance primâ facie evidence of an absence of negligence on his part, if the defendant brought forward evidence which was contradictory of that, then the burden of proof came again upon the plaintiff, because, if upon that conflict of evidence, part of which was given by the plaintiff and part by the defendant, the jury is left in doubt whether the plaintiff was or was not guilty of negligence contributing to the accident, the verdict and judgment must be for the defendant, because the burthen of proof lies wholly on the plaintiff. It does not require much to make primâ facie evidence for the plaintiff for this purpose. If the plaintiff gives evidence of the circumstances of the accident, and shews that there was negligence or evidence of negligence on the part of the defendant, and by the circumstances it is not clearly and conclusively shewn that the plaintiff was guilty of contributory negligence, then he has made

out a primâ facie case which must go to the jury, because, as I shall presently state, a jury is the only tribunal to determine it as long as cases are tried by a jury. When you are dividing a case between a judge and a jury, the jury is the only part of that tribunal which can say whether there has been negligence on either side. The judge is bound to define to the jury what is the legal meaning of the word "negligence." It may be defined as the doing of something which a person of ordinary care and skill under the circumstances would not do, or omitting to do something which such a person under the circumstances would do. When the judge has stated that definition, it is not for him to answer the question whether there has been negligence. In ninety-nine cases out of a hundred he is not so competent to answer it as a jury. Therefore in a case of this kind, if the plaintiff shews what he has done, then it is for the jury to say whether, in what he has done or what he has omitted to do, he was under the circumstances guilty of negligence. But, unless the plaintiff gives some evidence of the circumstances under which he acted, unless the jury have some means of knowing the circumstances of the accident, it seems to me they have no means of forming any opinion as to whether the plaintiff did anything which he ought not to have done or omitted to do anything which he ought to have done. There is nothing for them to pass a judgment upon. The cause of action being such as I have stated, and it being for the plaintiff to give some primâ facie evidence in the first instance of a negative which is part of that cause of action and without which it cannot be maintained, namely, that there has not been contributory negligence on his part, it follows that, if the plaintiff gives evidence to the effect that there was negligence on the part of the defendant which contributed to the accident, and gives no evidence at all with regard to his own conduct, he has only given evidence of half his cause of action, and therefore ought to be non-suited. It is not a case of the plaintiff's having made out a primâ facie cause of action which calls for an answer from the defendant. The plaintiff must always give evidence of every part of his cause of action. I do not retract any part of the statement which I made in the case of *Davey* v. *London and South Western Ry. Co.* (12 Q. B. D. 70) as to the principle of law in relation to the proof of the cause of action in cases of this kind. I do not think that anything which was said by the learned Lords in the case of *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (3 App. Cas. 1155) decides that the rule is otherwise than what I have stated. Therefore it seems to me that the plaintiff in this case was not only bound to give evidence of negligence on the part of the defendants which was a cause of the death of the deceased, but was also bound to give primâ facie evidence that the deceased was not guilty of negligence contributing to the accident. It was argued that there was such evidence in this case: that, in the absence of proof to the contrary, there was a presumption that out of regard to his own safety a man would be careful in dangerous circumstances. If there was such a presumption, then that presumption might be evidence in the plaintiff's favour. But can it be said that there is such a presumption? On the contrary, we all know that in many cases people are careless even when they are going near that

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which is dangerous. The plaintiff in this case has been unable to give any evidence at all of the circumstances of the accident. There appears to me therefore to be nothing from which anybody can say whether the deceased man was or was not guilty of negligence, and upon that ground, and upon that ground alone, I think that this non-suit must be upheld.

I am not prepared to say that there was no evidence of negligence on the part of the defendants. On the contrary, I think there was evidence upon which it was for the jury, and for the jury alone, to decide whether there was such negligence. It was said that there was no evidence that that negligence caused the death of the deceased man. I cannot agree to that, unless by "caused" is meant the same thing which I enunciated before, namely, that it was the sole cause. If the deceased was not guilty of contributory negligence, then the defendants' negligence was the sole cause of his death. The whole question whether the defendants' negligence caused the death depends upon whether the deceased was guilty of contributory negligence. It was suggested that the evidence conclusively shews that the deceased man must have been guilty of negligence, because a light might have been seen half a mile or a quarter of a mile up the line; and that the judge can decide that, because there was a distance of fourteen feet between the place from which he could see a light at that distance and the place where he had to cross the rails, he must have been negligent. Can that be said to be so in every case? Supposing that, at the time the man comes to this position, although the train has a light, it is raining heavily, or snowing heavily: those are circumstances which might prevent him from seeing the light. It is said that he must hear the noise. Supposing it is an engine coming down without a train, all I can say is that I am not satisfied that it would make such a noise that a person must hear it. Supposing that there is something on the other side of him which may reasonably distract his attention, for instance, a cart about to run over him, or another train coming the other way, can a judge, without knowing all this, undertake to say that the man was guilty of contributory negligence, because he did not look up the line and see a train coming, i.e., that he did something which a person of reasonable care would not have done, or omitted to do something which such a person would have done? That depends absolutely and entirely upon the circumstances of the particular case: and the judge is not the judge of these circumstances. The moment there is evidence I am firmly of opinion that it must go to the jury. It is true that under very peculiar circumstances the question may arise whether the verdict of the jury is against the weight of the evidence. Where that is so, the case ought to go for a new trial. But in this case it is not a question of sending the case for a new trial on the ground that the verdict was against evidence. It is a question whether judgment ought to be entered for the defendants by way of non-suit. For many years there was a great conflict amongst judges as to this power of the judges to express their own views as to the question of negligence, either before or after the decision of the jury. I consider, speaking for myself, that it has been settled by the House of Lords that these are questions for the jury on which they alone have a right to judge. The decision in *Davey* v.

London and South Western Ry. Co. (12 Q. B. D. 70), to which I myself was a party, was referred to for the defendants in connection with this part of the argument. I was apprehensive at the time when the case was decided that it might be made use of to reopen the old conflict, and might give rise to the supposition that judges might, either before or after the decision of the jury, express opinions on these matters which in my opinion are beyond their province. I think that case was a most exceptional one. In that particular case I think the majority of the Court thought that a verdict for the plaintiff would be against the weight of the evidence, and that it would be so far against the weight of the evidence, and the case had been so completely sifted, that they acted not really so much by way of non-suiting the plaintiff, as under the powers of the Judicature Act, which says that when they have all the facts before them they may prevent the case from going to a new trial and enter a judgment. I was afraid of that case; and I foresee now that it will be used over and over again to send us back into the old groove, and into the old conflict. It may be that, after having for years considered that the principle of law is settled, I am wrong, and that the question will be reopened and we shall have some new mode of summing up these cases to juries laid down—some other and different mode from that which I think has prevailed for years. If so, I shall submit to it, but only upon the highest authority. I give my decision in this case upon the ground that the plaintiff was bound to give primâ facie evidence of the negative of the deceased man's having contributed to the accident by his negligence, and that by reason of the plaintiff's having been unable to give, and not having given, any account of the circumstances of the accident, the plaintiff failed in giving evidence of that necessary part of the plaintiff's primâ facie case. I think the appeal must be dismissed.

BOWEN L.J. In this case the deceased man was in the way of a passing train, and the train ran over him. That is about all we know, with the exception of two facts to which I will presently refer. It seems to me that the story so told upon the plaintiff's own case leaves it absolutely uncertain whether the death of the deceased was due to the fault of the train or to his own fault. You cannot in justice or in reason inflict upon the railway company the burthen of paying for a death when the facts leave it uncertain whether they have really caused the death or not.

What is the gist of an action of this kind? In the first place, there must be negligence on the part of the defendants' servants for which the defendants are responsible: they must have committed some breach of duty, either by omitting to do what they ought to have done, or doing something which they ought not to have done; secondly, injury must have been occasioned to some one by that negligence; and thirdly, it is a principle long established in English law that, in order to maintain the action, the alleged negligence must have directly caused the injury without any contributory negligence on the part of the plaintiff. That is no new law at all. It is a law which has been expressed over and over again, and which has found its way into English pleading, because, as has been frequently pointed out in this case and often before in actions of negligence, the contributory

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negligence of the plaintiff was capable of being raised under the general issue. The difficulty of discussing the matter further begins when we come to analyze the question how far the negligence of the defendants' servants caused the accident in the sense which I have explained. Duties are relative, and the term "negligence" is itself correlative. It may mean the omission of something to be done. It may be the doing of something which ought not to be done. Again, if the circumstances of the case are partly told, or still more fully told, or at last completely extended, you get at each stage a difficulty in knowing how far the story so told involves the plaintiff in fault, or how far it disengages him from fault. It is by no means easy, therefore, to my mind to discuss scientifically as an abstract proposition the question how far you can separate the two issues, contributory negligence of the plaintiff and the causa causans of the accident consisting in the negligence of the defendants. They seem to me in most cases to be inextricably bound up together; but I entertain no doubt at all that the plaintiff must prove facts from which the proper inference is that the accident has been caused by the negligence of the defendants' servants exclusive of negligence on the part of the plaintiff himself. This subordinate question of the onus of proof of contributory negligence is further complicated by the fact that you have a sort of cross line of thought running through the law of evidence which often throws, not always but generally, the burthen of proving an affirmative on the person who maintains it. As I said before, it is not very easy, to my mind, to lay down an abstract proposition assuming that the two issues are always to be separate, because they are mixed up and conflicting in most cases, as it seems to me, or at any rate in many cases. I do not wish to weaken by any suggestion of mine anything that has fallen from the Master of the Rolls in this case. The only thing that I wish to observe is that it seems to me that, even if the law were not—I do not say it is not—completely expressed in the line along which he has travelled, still the plaintiff in this case must fail. If it is true that, over and above primâ facie evidence that it is the negligence of the defendants which caused the death, there must be evidence of the absence of contributory negligence, dividing the issues in that way, then the plaintiff is out of court, because there is no such evidence. If the true view be—I do not know that it really differs from the view of the Master of the Rolls: it is perhaps rather a different manner of expressing it — that, in regarding the issue whether the death has been solely caused by the defendants, you must have regard to the question whether the plaintiff involved himself in the injury, even then it seems to me that in this particular instance the plaintiff also fails. The term "onus of proof" really means this only to my mind. It is only useful to apply it in this sense. It is not a means of enabling you to decide between conflict of testimony. It enables you, if the case stops at any particular point, and you have to draw the line there, to say on whom rests the burthen of going further, if he wishes to succeed. Accordingly the onus of proof is continuously changing through the whole of a trial at nisi prius. I will not go through what I said once before in the case of *Abrath* v. *North Eastern Ry. Co.* (11 Q. B. D. 440), which I think is nothing new but which I

believe to be true. Supposing that in this particular instance we are to examine the case according to the strict application of onus of proof, and to assume that the plaintiff had given some evidence of negligence by the railway company which caused the death, and that we are to look for absence of contributory negligence, it seems to me that the case has already travelled beyond the point at which it would have stood if we only knew what the train had done. I protest myself that I doubt very much whether there is any evidence of negligence at all in this case to go to the jury. I say so with the greatest hesitation, because I know that is not the opinion of the Master of the Rolls. To my mind absence of whistling is not in itself evidence of negligence. It is only, when accompanied with other facts that raise the presumption that some such precaution as whistling ought to be taken, that it is evidence of negligence. For example, a train is travelling across a prairie where it can be seen miles off. Across every part of that space it may be that foot-passengers are in the habit of passing with their cattle. Is it to be said that the train is to pass along whistling the whole way? No; because the facts shew in that particular case that whistling is not a necessary precaution. Everybody who has got eyes can see, and it is no more reasonable to my mind to suppose that a train ought always to whistle than it is to suppose that a ship ought always to whistle. A ship ought to whistle in a fog, or use its foghorn, because whistling then becomes a reasonable precaution. I do think that in nine cases out of ten it is for a jury to say whether, having regard to the special circumstances, the absence of whistling is a fact from which they can presume that a reasonable precaution was neglected. But, on the other hand, I myself think that if there is nothing except evidence of absence of whistling and nothing to shew that whistling is a reasonable precaution, or that no precaution was taken, it is very doubtful, to say the least, whether that is evidence to go to the jury. But, if there was evidence of negligence in this case—which I will assume for the purpose of argument—was there evidence that that negligence caused the man's death? Now, really, how can anybody say that they could reasonably conclude simply from the fact that a train, passing along a place where it could be seen half a mile each way with a light on a clear night, did not whistle, that the absence of whistling caused the man's death? But I will assume again that that was evidence to go to the jury that the death was caused by the negligence of the railway company, if there were nothing else. The moment there is something else, the foundation of the evidence which has already been given is shaken. Standing alone, if there was nothing else, when it is found that the railway company had been negligent, it might be inferred, if that was the only negligence in view, that that was the negligence which produced the effect. It would be, I think, a rash presumption, but still it may be so. Here other facts are introduced which shake that conclusion and make it impossible. The train did not whistle. The man did not look. If he had looked, surely he must have seen that train. There was nothing to prevent him from seeing it. Of course one cannot infallibly conjecture what happened when one was not there to see; but to my mind the fact that the man was killed in the middle of the line, along the side of which a passing train could

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be seen for half a mile or thereabouts, is as strong evidence that the man did not look as the absence of whistling is strong evidence that the train ran him down carelessly. Now if it is a mere balance of testimony—some preponderating one way and some the other—I agree it would be for the jury to decide; but the remarkable effect of the telling of the whole story here is that you introduce into the part of the case which is dealing with the cause of the accident an independent action on the part of the deceased man which makes it impossible for any reasonable person to have a view at all. I think the case must be decided really in accordance with my suggestion during the argument, that here it is impossible, having regard to the facts as to how the man was found and what he must have omitted to see, for any reasonable person, on the story so imperfectly told, to be in anything except complete doubt as to whether it was the train's fault or the man's fault that he was killed. The evidence of the action of the plaintiff himself applied to what the train has done makes it impossible to draw any inference from what the train has done. It is not that there is a balance of testimony, but that there is an impossibility of arriving at any conclusion. Now under these circumstances it is said that we ought to call in aid a presumption. What presumption? That the deceased was a sober and reasonable person? Consider what courts of justice would become if they were to act upon that sort of basis. There being no proof as to how an accident happened, but only proof that the deceased person was an intelligent and quiet man, we are asked to draw the inference as one of law or an inference which the law directs us to draw from proved facts that the man was not in fault. There is no such presumption known to the law. It is not a presumption which can be drawn from the ordinary course of nature. It is not a presumption which comes under that head, because it is not the ordinary course of nature for people to be careful in any such uniform sense that you can take that as a groundwork from which to step to a further conclusion. Presumptions are not excuses for guessing in the dark. They are inferences drawn by sound reason from something which is proved or taken for granted as proved. Here there is nothing proved or to be taken for granted as proved, which leads you to any further conclusion about the conduct of the plaintiff. It is always a matter of regret when the facts of a case are so imperfectly known that justice is baffled in coming to a conclusion, but we cannot help it if there are no materials for coming to any further conclusion in the matter. For these reasons I think the appeal must be dismissed.

FRY L.J. The first inquiry in this case appears to me to be this—namely, what propositions rest on the plaintiff to prove. The first of these proposition plainly is that the defendants were negligent. The second proposition which the plaintiff must maintain is that the negligence of the defendants was the cause of the accident. So far there is no doubt. The Master of the Rolls is of opinion that a third proposition rests on the shoulders of the plaintiff—namely, that there was no contributory negligence on the part of deceased, and that the negligence of the defendants was the sole cause of the accident. I should feel much distrust of my own judgment if I were to express any dissent from the view of the Master of the Rolls. It appears

to me, I confess, that the speeches of Lord Penzance and Lord Cairns in *Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* (3 App. Cas. 1155) do not put the burthen of that third proposition on the plaintiff, and that they consider that a plaintiff has made out his case if he has shewn that the defendants were negligent and that their negligence was the cause of the accident. I do not propose to express any opinion upon the question whether that third proposition does or does not rest on the shoulders of the plaintiff, and for the present purpose I will assume that the two first propositions only rest upon the plaintiff.

Taking it in that manner, the first inquiry is whether the plaintiff has shewn that the defendants were negligent. Upon that point my opinion is that there was evidence of negligence on the part of the defendants. It must be borne in mind that the jury had the opportunity of seeing the spot, and that the operation of a light, the protection afforded by the head-light carried by the engine, might depend more or less upon the surrounding lights from the cottages, and possibly from the signal-boxes. It must also be borne in mind that a watchman placed at the gates during the day was withdrawn at eight o'clock in the evening. In addition to that it was proved that the train did not whistle, and that it did not slacken its pace. Now, whilst agreeing that not whistling is not in itself conclusive evidence and perhaps, under some circumstances, not evidence at all, of negligence, I think that, coupling all the circumstances to which I have referred together, there was evidence to go to the jury of negligence on the part of the defendants.

Then arises the second inquiry—namely, whether there was evidence to shew that that negligence of the defendants was the cause of the accident. I am of opinion that there was no such evidence. Of course a jury might make a conjecture; but it appears to me that there was no evidence from which they could arrive at a conclusion as to whether the negligence of the defendants was the cause of the accident. My brother Bowen has so fully dealt with that part of the case, and so fully expressed the views which I entertain, that I will not attempt to repeat the observations which he has made. To my mind it appears that there is nothing in the nature of evidence to connect the negligence of the defendants with the death of the deceased, and nothing whatever to leave the minds of the jury otherwise than in a condition of perfect equipoise as to what was the cause of the death. It is certainly difficult to suppose that the deceased can have been killed by the train under the circumstances which have been indicated in the evidence—the space between the line and the gates and the length of line down which he could look—without contributory negligence on his part. Whether that be so or not, the conclusion at which I have arrived is simply this, that, although there was evidence of negligence to go to the jury, there was no evidence to connect that negligence with the death of the deceased. I therefore concur in the judgment of my learned brothers that this appeal must be dismissed.

E. L.

1896
Jan. 22.

VESTRY OF FULHAM *v.* SOLOMON.

Local Government—Defective Water-closets—Notice requiring Owner to Amend—Validity of—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76), *s.* 39, *sub-s.* 3; *s.* 41, *sub-s.* 2.

By the Public Health (London) Act, 1891, s. 39, sub-s. 1, the county council are required to make by-laws with respect to water-closets; and by sub-s. 3 any directions given by the sanitary authority under that Act so far as they are not in accordance with such by-laws shall be void.

By s. 41, sub-s. 2, if on examination any water-closet "appears to be in bad order and condition or to require cleansing alteration or amendment," the sanitary authority shall serve a notice on the owner requiring him to put it in proper order or condition.

And by sub-s. 3, "Any person who thinks himself aggrieved by any notice . . . . of a sanitary authority under this section in relation to any water-closet . . . . may appeal to the county council whose decision shall be final."

The county council made by-laws under s. 39 with respect to future water-closets prescribing the mode of their construction, but made none with respect to structural alterations of existing water-closets.

The respondent was the owner of a water-closet which had been constructed before the making of the by-laws. The appellants as the sanitary authority, purporting to act under s. 41, sub-s. 2, served a notice on the respondent requiring him to make certain structural alterations in the water-closet:—

Held, (1.) that upon a summons for non-compliance with the notice the magistrate had jurisdiction to inquire into the validity of the notice notwithstanding the provisions as to an appeal to the county council.

(2.) That the notice was void under s. 39, sub-s. 3, there being no by-laws for it to be in accordance with:

Held, also, by Kennedy J., that the "alteration or amendment" which the sanitary authority are empowered to require under s. 41, sub-s. 2, does not comprise structural alteration.

Case stated by a metropolitan police magistrate.

The respondent was the owner of certain premises in the parish of Fulham known as 30, Langford Road. On February 5, 1895, the appellants served upon the respondent a notice, which, after reciting that on January 11, 1895, the appellants' sanitary inspector entered upon the said premises and examined the water-closets and other work and apparatus connected therewith, and that on such examination the said water-closets and

other works and apparatus were found to require cleansing, alteration, or amendment, proceeded to require the respondent within fourteen days to remove the door and lath-and-plaster partition, and to construct the walls of the water-closet of brick or brick noggin, and make the water-closet door to open outwards through the outer wall. The respondent did not appeal against such notice to the London County Council, nor did he comply with the said notice.

The appellants thereupon summoned the respondent under s. 41, sub-s. 2 (1), of the Public Health (London) Act, 1891, for having made default in complying with the notice. The respondent's said house and water-closet and other works and apparatus connected therewith were constructed before the passing of the said Act and of the by-laws of the London County Council made thereunder, which by-laws were, so far as they related to the structure of water-closets, expressed to be confined in their operation to water-closets to be thereafter constructed. The magistrate held that he had jurisdiction to inquire into the validity of the appellants' said notice; that the notice was bad in substance; and that not being in accordance

(1) By the Public Health (London) Act, 1891, s. 39, sub-s. 1, "The county council shall make by-laws with respect to water-closets . . . . and the proper accessories thereof in connexion with buildings whether constructed before or after the passing of this Act."

Sub-s. 3: . . . . "any directions given by the sanitary authority under this Act shall be in accordance with the said by-laws, and so far as they are not so in accordance shall be void."

Sect. 40, sub-s. 1: "The sanitary authority may examine . . . . any water-closet, &c."

Sub-s. 2: . . . . "if on examination any such work is found not to be in proper order or condition, or not to have been made or provided by any person according to the said by-laws and directions, or to be contrary to this Act, the reasonable expenses of the examination shall be repaid to the sanitary authority by the person offending."

Sect. 41, sub-s. 2: "If on such examination as aforesaid any water-closet . . . . appears to be in bad order and condition or to require cleansing alteration or amendment or to be filled up, the sanitary authority shall cause notice to be served on the owner or occupier of the premises . . . . requiring him . . . . to do what is necessary to place the work in proper order and condition."

Sub-s. 3: "Any person who thinks himself aggrieved by any notice or act of a sanitary authority under this section in relation to any water-closet . . . . may appeal to the county council, whose decision shall be final."

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with the by-laws it was void under s. 39, sub-s. 3. He accordingly dismissed the summons subject to a case for the opinion of the Court.

Macaskie, for the appellants. The magistrate had no jurisdiction to consider the question of the validity of the notice. If the notice was a bad one the remedy was by way of appeal to the county council under s. 41, sub-s. 3. The Act by giving that remedy ousts the jurisdiction of the magistrate to go behind the notice. In *Vestry of St. James and St. John, Clerkenwell* v. *Feary* (1), upon the corresponding section (s. 211) of the Metropolis Management Act, 1855, Lord Coleridge held that nothing was open to the magistrate except to inquire whether the order was made and whether it was disobeyed. And in *Attorney-General* v. *Hooper* (2) Stirling J., dealing with similar provisions in a local Act, adopted the same view.

[WRIGHT J. In *Vestry of St. James and St. John, Clerkenwell* v. *Feary* (1) the order may have been improper, but there was nothing in the Act of Parliament making it void; whereas here the notice was void by statute if it was not in accordance with the by-laws. We think that in the present case the magistrate had jurisdiction to inquire whether the notice was not an absolute nullity.]

Secondly, the provisions of s. 39, sub-s. 3, avoiding directions not in accordance with the by-laws, must be read as confined to directions which purport to be based upon supposed breaches of the by-laws. The statute deals with two classes of offences—first, offences against by-laws, and secondly, offences against the Act or against the common law. Sect. 40, sub-s. 2, says what is to be done in the matter of the expenses of examination of water-closets if they are "found not to be in proper order or condition, *or* not to have been made according to the said by-laws?" That section clearly contemplates that a water-closet may be in strict accordance with the by-laws and yet not in proper order or condition. Then s. 41 in sub-s. 1 deals with the remedies for breaches of the by-laws; while in sub-s. 2, under which the present summons was taken out, it deals with the other

(1) 24 Q. B. D. 703. (2) [1893] 3 Ch. 483.

class of offences, which are wholly independent of the existence of any by-laws. Thirdly, if s. 39, sub-s. 3, is to be treated as applying to a notice under s. 41, sub-s. 2, then the words "in accordance with the said by-laws" must mean "in accordance with the said by-laws if any." It cannot be said that a notice is not in accordance with a by-law which admittedly has no application to the subject-matter of the notice, and which therefore may practically be treated as not existing.

Shearman, for the respondent, was not called upon.

WRIGHT J. The magistrate held that he was bound to consider whether the notice served on the respondent was not void. I think that he was right in so holding. As the existence of a valid notice was the foundation of his own jurisdiction to entertain the complaint for non-compliance with it, he must have had jurisdiction to inquire whether what purported to be a valid notice was not a mere nullity. Then the magistrate found that the notice was in fact void as not being in accordance with the by-laws, which (so far as material) were prospective only and did not apply to closets constructed before the date of the making of those by-laws. There, again, I think he was right. A notice or direction cannot be said to be in accordance with the by-laws if there are no applicable by-laws in existence for it to be in accordance with.

KENNEDY J. I am of the same opinion and for the same reasons. But I should like to add that in my view the words "is found not to be in proper order or condition" in s. 40, sub-s. 2, and "appears to be in bad order and condition" in s. 41, sub-s. 2, do not refer to defects in the structure, nor do the words "require alteration or amendment" in the last-mentioned sub-section refer to structural alteration.

Appeal dismissed.

Solicitor for appellants: *T. Blanco White.*
Solicitors for respondent: *Marshall & Haslip.*

J. F. C.

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Jan. 27.

FORTUNE, Appellant; HANSON, Respondent.

Adulteration—Food and Drugs—Certificate of Analysis, Sufficiency of—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 18, 21.

In a prosecution under the Sale of Food and Drugs Act, 1875, for selling adulterated milk to a purchaser, the only evidence of adulteration was the certificate of the public analyst, which stated that the sample submitted to him "contained the percentage of foreign ingredients as under: 5 per cent. of added water":—

Held, that the certificate was bad as evidence, under the Act, of adulteration, because it did not state the constituent parts of the sample analyzed.

Case stated by one of the metropolitan police magistrates under the Summary Jurisdiction Acts.

The respondent appeared before the magistrate at the Clerkenwell Police Court to answer an information laid by the appellant, charging that the respondent sold, and proceeded to deliver, to the purchaser a churn of milk, the same not being of the nature, substance, and quality of the milk demanded by such purchaser, contrary to the provisions of s. 6 of the Sale of Food and Drugs Act, 1875, and of s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879. (1)

(1) The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 6: "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty," &c.

Sect. 13: "Any medical officer of health, inspector of nuisances . . . may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analyzed by the analyst of the district or place for which he acts . . . and such analyst shall . . . with all convenient speed analyze the same and give a certificate to such officer, wherein he shall specify the result of the analysis."

Sect. 18: "The certificate of the analysis shall be in the form set forth in the schedule hereto, or to the like effect."

Sect. 20: "When the analyst having analyzed any article shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence," before justices in a summary manner.

Sect. 21: "At the hearing of the information in such proceeding the production of the certificate of the analyst

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The following facts were stated in the case: The respondent sold to one E. Jones a churn of milk. Whilst the milk was being delivered to Jones at his shop, the appellant, who is an inspector of nuisances for the parish of St. Mary, Islington, procured a sample of the milk, and caused it to be analyzed by the public analyst of that parish, who duly delivered his certificate of the analysis.

The certificate was, so far as is material, as follows: "I, the undersigned, public analyst for the parish of St. Mary, Islington, in the county of London, do hereby certify that I received on the 25th day of April, 1895, from Mr. Fortune, a sample of milk, marked as above, for analysis (which then weighed 20 ounces), and have analyzed the same and declare the result of my analysis to be as follows:

"I am of opinion that the said sample contained the percentage of foreign ingredients as under:

"5 per cent. of added water to the prejudice of the purchaser."

At the hearing of the information the certificate was put in as evidence of the offence charged. Objection was thereupon taken on behalf of the respondent that the certificate was bad, and inadmissible as evidence under the sale of Food and Drugs Act, 1875.

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shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness," &c.

The form of certificate given in the schedule is (so far as material) as follows:—

"I, the undersigned, public analyst for the ——, do hereby certify that I received on the —— day of ——, 18—, from ——, a sample of —— for analysis (which then weighed ——), and have analyzed the same, and declare the result of my analysis to be as follows:—

"I am of opinion that the same is a sample of genuine ——

or,

"I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under:—

By s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), any medical officer of health, inspector of nuisances, &c., may procure at the place of delivery any sample of any milk in course of delivery to the purchaser in pursuance of any contract for the sale to such purchaser, and shall submit the sample to analysis in the same way, and the analysis shall be made and the same proceedings taken, as if the officer or inspector had purchased the milk under s. 13 of the principal Act.

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The magistrate rejected the certificate, and therefore dismissed the information.

The question for the opinion of the Court was whether, upon the facts above stated, the magistrate's rejection of the certificate was right in point of law.

Macmorran, for the appellant. The analyst's certificate was sufficient to found a primâ facie case of adulteration against the defendant, and the magistrate ought not to have rejected it. The certificate followed the form in the schedule to the Sale of Food and Drugs Act, 1875. It specified the "result of the analysis" so as to comply with s. 13, and it "appeared" from the certificate that an offence against one of the provisions of the Act had been committed, so as to satisfy the language of s. 20. No hardship or injustice could be done to the defendant by admitting the certificate, because he was entitled, under s. 21, if he desired to question it, to require that the analyst should be called as a witness, and to have tested his conclusion by cross-examination. Water added to milk is a "foreign ingredient," and the analyst was entitled to adopt the alternative mode of reporting the result of his analysis provided by the form.

Morton Smith, for the respondent. Water is one of the constituents of all milk; it is not necessarily a "foreign ingredient" at all. The proportion of water in different samples of milk varies greatly according to the food of the cows producing it, and other conditions. Opinions differ widely as to how high the percentage of water found in milk ought to be in order to establish that water has been added. The certificate, therefore, ought to have set out the constituent parts of the milk, so that the magistrate might himself decide whether the analyst's conclusion, that water had been added, was right. The defendant, also, was entitled to know the facts which were found to be the result of the analysis in order to enable him to meet the case made against him. If it be conceded that a certificate in this form could be good where the foreign substance found in the sample was something—pepper, for instance—which would not ordinarily be found in milk, still, where the charge

is one of adulteration and the alleged foreign substance is something which is a constituent of the article analyzed, the constituent parts of the sample must be set out. *Bakewell* v. *Davis* (1) and *Newby* v. *Sims* (2) are, it is contended, direct authorities for that proposition.

Macmorran, in reply, referred to *Harrison* v. *Richards*. (3)

HAWKINS J. I am of opinion that the magistrate's decision cannot be reversed. [The learned judge read the sections set out ante.] Sect. 21 practically makes the certificate conclusive evidence of the facts stated therein. The objection taken before the magistrate on behalf of the respondent was that the certificate was bad on the ground that it did not state the parts which the sample submitted to the analyst contained. I am of opinion that the certificate was insufficient for the purpose for which it was given. Admittedly there must be a certain percentage of water in all milk, because water is one of the constituents of milk. I think that the Legislature meant that the certificate must state such facts as would enable the magistrates themselves to come to a conclusion whether the article of food in question had, or had not, been adulterated. If the analyst found in the milk some material substance which could not or ought not to be found in milk at all, it would be sufficient for the certificate to state that the sample of milk submitted to him contained so much percentage of foreign ingredient; but when the magistrates have to decide whether the sample contained 5 per cent. of added water, the question becomes much more difficult, because water is to be found in milk in its most pure state. It has been stated to be, and no doubt is, the fact that there is a great variation between the standards adopted as to what percentage of water found in milk would be sufficient to shew that water had been added. I think the magistrates are entitled to inquire, and the Legislature intended they should have a statement, in such a case as this, of the parts of which the sample was composed. To say merely that a sample of milk contained 5 per cent. of added

(1) [1894] 1 Q. B. 296. (2) [1894] 1 Q. B. 478.
(3) 45 J. P. 552.

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water is only to state the analyst's own opinion that water has been added. The magistrates have to exercise their own judgment on the question. They may adopt one standard; the analyst another. They ought to be informed by the certificate what was the total percentage of water found in the sample. It is not enough for the analyst to say, "I say that 5 per cent. of water has been added." I am of opinion, therefore, that this certificate was bad because it did not give the magistrate the information which he was entitled to have, and that our judgment on this case should be for the respondent.

KENNEDY J. I am of the same opinion. The Legislature has given great power to the analyst's certificate; and, without at all saying that water, if it be added to milk, is not a "foreign ingredient" within the meaning of the Act, I think that the certificate, to be a good certificate, must give data upon which the magistrate can act without further evidence. It must present the facts of the analysis sufficiently to shew, if necessary, that the provisions of the Act have been infringed. Nobody, in my opinion, who knew how debatable the point is as to the proportion of water to be found in unadulterated milk under different circumstances, could fairly say that a person ought to be convicted of an offence against the statute on the mere statement that the milk contained 5 per cent. of added water. I think it would be wrong to convict on that alone. It is a statement of the analyst's conclusion without stating what standard he has adopted in arriving at the excess of 5 per cent. which he says has been added. It is not sufficient to say, as the analyst here has said in effect, "I come to the conclusion that the sample of milk submitted to me is not genuine because it contains so much added water." The Legislature intended that the certificate should go much farther than that, and give the magistrates information which enables them to come to a conclusion themselves, and enables the person charged to understand and, if possible, negative the charge. The cases cited on behalf of the respondent do not, in my judgment, absolutely govern this case; but the principle upon which the

judgments in *Newby* v. *Sims* (1) are founded seems to me the principle upon which I am acting in the present case, which is, that the certificate must really and truly be a certificate of the result of the analysis—that is, it must state the facts which are the result of the analysis. The Court in *Newby* v. *Sims* (1) held that a certificate, which stated that a sample of rum contained 13 per cent. of water in excess of that which was allowed by statute, was too vague. I do not intend, in this case, to decide what may or may not be a "foreign ingredient" within the meaning of the Act. I do not say that a foreign ingredient must be something different from what is ordinarily found as a constituent of the article submitted to analysis. But the form given in the schedule clearly recognises that a difference should be made in the certificate. If something which could not exist as a constituent in water—such as pepper or sand—were found, then it would be sufficient to state in the certificate that the sample analyzed contained so much per cent. of foreign ingredient; but where the thing said to be added is one of the constituents of the article analyzed, then, in my opinion, the analyst must in his certificate state the facts on which he has come to his conclusion sufficiently to enable the magistrates to come to a conclusion themselves.

Judgment for the respondent.

Solicitor for appellant: *Stanley Hoare.*
Solicitor for respondent: *W. T. Ricketts.*

(1) [1894] 1 Q. B. 478.

W. A.

C. A.
1896
Jan. 13.

[IN THE COURT OF APPEAL.]

BARRY *v.* THE PERUVIAN CORPORATION, LIMITED.

Practice—Commercial Cause—Application to enter Cause in Commercial List before Appearance of Defendant—Power to order Costs to be Costs in the Cause.

An application by a plaintiff to the judge charged with commercial business for leave to enter the cause in the separate list of commercial causes may be made before the appearance of the defendant, and before the time for such appearance has expired, and the judge has power to direct that the costs of the application shall be costs in the cause.

APPLICATION for leave to appeal against two orders made by a judge at chambers. The action was for demurrage, and as soon as the writ was served the plaintiff applied by summons to the judge at chambers charged with commercial business for leave to enter the cause in the separate list of commercial causes. When this application was made the defendants had not appeared, and the time for appearance had not expired. A copy of the summons was served on the defendants with the writ. The learned judge (Mathew J.) made the order, and directed that the costs of the summons should be costs in the cause, with liberty to the defendants to apply.

After appearance the defendants applied for a rehearing of the summons, which was refused. The defendants now applied for leave to appeal against the original order and the refusal to rehear the summons.

Lauriston Batten, for the defendants. The order was made at a time when the defendants had not appeared, and they had no opportunity of being heard. Till the expiration of the time for appearance the defendants had a right to disregard all proceedings. Admitting that this is a commercial cause, it does not follow merely from that fact that it should go into the commercial list, and the defendants ought to have an opportunity of stating their objections to that course.

LORD ESHER M.R. We have to say what we think is the proper rule of practice with regard to entering such a case as this in the list of commercial causes. The notice put forward by the judges in February of last year as to such causes did not alter the laws of evidence or the legal effect of any procedure. The causes in the commercial list are of the same kind as any other causes, except that they relate to commercial business. The notice relating to such causes was not a rule made by authority, but a practice agreed on by the judges of the Queen's Bench Division, who have the right to deal by convention among themselves with the mode of disposing of the business in their courts. They can deal with the question of what judge a cause shall come before; and for the benefit of suitors it has been arranged that on the application of either party a commercial cause may be put on a separate list, so as to be in train to be tried before one of several judges. When that is done, the judge at chambers will deal with the case under the rules by directions as to the mode of trial and other preliminary steps. We have consulted the Lord Chief Justice and Mr. Justice Mathew, and we are of opinion that this can be done at the instance of the plaintiff as soon as the writ is served, and that the costs of the summons may be made costs in the cause. It is not necessary that the defendant should be before the judge; but if the order is made, the defendant, when he appears, may object that the cause is not in fact a commercial cause. That is the only ground on which he can object, and if he is right in this, no injury will be done by the making of the order, for it would be set aside, and with it the order as to costs. Such a course makes the practice simple and clear, and where a cause is really a commercial cause one summons only is required. In this case the objection to the order was not that the cause was not a commercial cause, but that the order was made before the appearance of the defendants. The order made was perfectly right, and this motion must fail.

A. L. SMITH L.J. The plaintiff issued his writ in what was a commercial cause pure and simple, and thereupon applied to have the cause put into the commercial list. This application

C. A. 1896

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A. L. Smith L.J.

was made before the defendants appeared, and it is said that the order was made without jurisdiction and was wrong on that ground. I am of opinion that the order was rightly made. The intention of the practice established by the notice of February, 1895, was that the judge to whom commercial causes are assigned should get seised of them at the earliest possible moment. What Mathew J. has done is to say that the cause should go into the commercial list and that the costs of the summons should be costs in the cause. This he had power to do, and the presence of the defendants when that order was made was not necessary. This is not a question of change of venue. Then it is said that the learned judge would not hear the defendants, after they appeared, on their objecting to the case having been placed in the commercial list before they had appeared; but I think the learned judge was quite right, for the only objection that the defendants were then entitled to take was that the cause was not a commercial cause, and that was not the ground of their application. As to the question of costs, the order was not one for costs against the defendants, who were not before the learned judge, but was an order that the costs of the summons should be costs in the cause, it being a proper step in the cause. I think this was within the power of the learned judge, and that this application must be refused.

RIGBY L.J. I am of the same opinion. The moment the conclusion is arrived at, and the conclusion seems to me to be inevitable—that the making up of a separate list for commercial causes, as distinguished from the question whether a particular action is a commercial cause, is not a matter on which the parties can address any argument to the Court, the question before us is perfectly simple. The plaintiff in a commercial cause has an absolute right to go before the judge charged with commercial business, directly the writ is issued, to ask for the insertion of the cause in the commercial list. The alternative course would involve two steps instead of one—firstly, the bringing the defendant before the judge, and secondly, the consideration whether the cause should go into the commercial list.

It is obvious that the advantage is with the course taken in this case. If a doubt arises whether the case is a commercial cause, it is practical and convenient to give the defendant leave to apply as was done in this case; but the only thing that he can apply about is the question whether the cause is or is not a commercial cause. If he establishes that it is not a commercial cause, the order, including that part of it which deals with costs, will be discharged, and no injury will be done to the defendant.

Application refused.

Solicitors: *Smiles, Ollard, Yates & Ollard.*

A. M.

STERN *v.* THE QUEEN.

1896 *Jan.* 13.

Revenue—Probate Duty—Shares in Foreign Company—Certificates Transferable in this Country by Delivery.

Certificates of shares in a foreign company on which a form of transfer and power of attorney has been indorsed and executed in blank may be liable to probate duty, if they are marketable in this country and are operative by delivery.

Attorney-General v. *Bouwens* (4 M. & W. 171) followed.

SPECIAL CASE stated in a petition of right by and between the suppliants and the Attorney-General.

Baron Herman de Stern died in England on October 20, 1889, having duly made his last will dated August 17, 1881, whereof he appointed the suppliants Baroness Julia de Stern, Herbert Stern, James Stern, and Jacques Stern the executors. At the time of Baron de Stern's death he was an English subject and was domiciled and resident in England.

The suppliants in due course applied for and subsequently obtained a grant of probate of the said will. For the purpose of obtaining this probate the suppliants made the affidavit required from persons applying for probate in England under s. 29 of the Customs and Inland Revenue Act, 1881 (44 & 45 Vict. c. 12). Together with this affidavit there was delivered by the suppliants an account of the particulars of the personal estate for or in respect of which the probate was to be granted, and of

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the estimated value of these particulars. The suppliants paid duty to the amount of 106,242*l.* on the estimated value, and the affidavit was stamped accordingly. Subsequently the suppliants discovered and alleged that there had been erroneously included in the affidavit and account a portion of the personal estate of the deceased which, as they alleged, should not have been included therein, and which was therefore not liable to probate duty. This portion consisted of shares in railway companies constituted under the laws of divers of the States included in the United States of America, or under the laws of the United States. These railway companies were all domiciled in the United States. The documents of title which were issued to and held by the shareholders in these American railway companies are certificates certifying that the person therein named is entitled to the number of shares named therein in the capital stock of the company, and further certifying as to the manner in which these shares are transferable. Upon every certificate there is indorsed a form of transfer and power of attorney in blank.

At the time of the death of Baron de Stern, and for a long time theretofore, such shares were marketable in England, and were commonly bought and sold and dealt in on the London Stock Exchange and other markets in England for securities of the kind. The certificates for the whole of the shares in question were in England at the date of Baron de Stern's death, and were in his possession or in that of his agents or trustees. The whole beneficial interest in and title to the shares were the property of and passed under the will of Baron de Stern as part of his personal estate. None of the certificates of proprietorship of the shares were in the name of Baron de Stern, but all were in the names either of the firm of Stern Brothers or of other persons or firms. At the date of the death of Baron de Stern the forms of transfer and powers of attorney (which were indorsed on all the shares) had in regard to a large number of the shares been signed by the firms or persons in whose names the certificates of proprietorship were made out; but with regard to some of the shares of which the certificates were in the name of Stern Brothers the forms of transfer and

powers of attorney indorsed upon them had not been signed by Stern Brothers at the date of Baron de Stern's death.

The suppliants lodged with the Commissioners of Inland Revenue a corrective affidavit, in which they claimed a return of the sum of 8187*l.*, being the amount of duty paid in respect of the shares in question. The commissioners declined to return the duty or to admit the suppliants' contentions. The suppliants then lodged a petition of right, claiming the amount. The Attorney-General lodged an answer and plea to the petition, and the suppliants joined issue thereon. This special case was then stated by consent, the question for the opinion of the Court being whether the suppliants were exempt from probate duty in respect of any of the shares in question.

Paragraph 8 of the special case was as follows :—

"By American law (as stated in evidence in the case of *Colonial Bank* v. *Cady and Williams* (1), which it has been agreed shall be applied to this case, and subject to the power of the Court to draw inferences therefrom) where the indorsed transfer has been duly execu ed by the registered owners of the shares, the name of the transferee being left blank, delivery of the certificate in that condition by him or by his authority, with intent to transfer, transmits his title to the shares both legal and equitable. The person to whom it is delivered can effectually transfer his interest by handing the certificate to another, and the document may thus pass from hand to hand until it comes into the possession of a holder who thinks fit to insert his own name as transferee, and to present the document to the company for the purpose of having his name entered in the register of shareholders and obtaining a new certificate in his own favour. The delivery of the certificate, with the transfer executed in blank, 'passes the property' of the shares, but that statement must be qualified. The right of the holder is in the nature of a jus ad rem, and not of a jus in re. Delivery does not invest him with the ownership of the shares in the

(1) 15 App. Cas. 267. [The law in question in that case was the law of the State of New York, which, as proved, appeared to most of the noble and learned Lords who took part in the decision not to differ from the law of England.—F. P.]

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sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and transfer, the original transferor who is entered as owner in the certificate and register continues to be the only shareholder entitled to vote and draw dividends in respect of the shares until the transferee or holder for the time being obtains registration in his own name. Such delivery, therefore, passes, not the property of the shares, but a title legal and equitable, which will enable the holder to have the shares vested in himself by registration in the books of the company without risk of his right being defeated by any other person deriving title from the registered owner. According to the custom of bankers and stockbrokers, both in this country and America, a certificate with the indorsed transfer executed in the manner already described is regarded as being 'in order,' and its delivery in exchange for value received is understood to be sufficient to pass the full title of the registered owner. Even when the delivery has been fraudulent the registered owner cannot reclaim the document from a holder who has given valuable consideration in good faith and without notice of the fraud. The instrument, however, does not possess any privilege of negotiability in the legal sense of that term. The registered owner's inability to reclaim is based upon the circumstances that the registered owner has so dealt with that certificate as to lead the purchaser for value to believe that he was taking a good title to it, and the foundation rests in the principle of 'estoppel.' When the executors of a registered owner find it necessary to dispose of his shares they may for that purpose sign either the indorsed transfer or a separate transfer. But these documents by themselves are insufficient to enable a person to whom the executors intend to pass the shares to obtain registration and a new certificate in his own name. In order to effect that object it must be proved to the satisfaction of the company that the persons signing the transfer as executors really possess that character, and also that their signatures to the transfer are genuine. Although registration may be obtained upon the production of such evidence the documents are not 'in order,' or, in other words, are not

accepted in commercial circles as sufficient vouchers of title, unless they are accompanied by an extract of the probate or will and an attestation of the genuineness of the executors' signatures by the United States Consul or other competent officer. The company, upon the request of the holder for the time being of the certificate and on its production, is bound to register the name of such holder or of his nominee, and to issue a new certificate in such name in exchange for the old certificate. The statements in the body of the certificates, such as that the shares are transferable in person or by attorney in the books of the company, and the like statements, do not prevent the delivery of a certificate with the transfer and power of attorney signed in blank by the registered owner, being as between the parties to the transaction a good assignment of the shares both in law and in equity, nor prevent such delivery from passing the title to the shares both legal and equitable. As between the parties to the transaction, the transfer is entirely completed by the delivery of the certificates as aforesaid, and the deliveree of the certificates can effectually transfer his interest by handing his certificates to another. But the company, for the purposes of the right to vote, the receipt of dividends, and the other rights of shareholders, is entitled to have regard only to the registered shareholder, and where a registered shareholder is indebted to the company the company can (if the debt from the shareholder became due to the company before the company had notice of the transfer of the share) refuse to register a transfer of the shares until the obligations of the shareholder have been satisfied. The practice and course of business is that the registered owner receives the dividend from the company and then pays it over to the holder for the time being of the certificate, such payment being made on production of the certificate, which is then indorsed with notice and date of such payment."

Cohen, Q.C. (*Moulton, Q.C.*, and *A. T. Lawrence* with him), for the suppliants. Duty is not payable in respect of these shares. This stamp duty is chargeable under 55 Geo. 3, c. 184, s. 38, which is preserved by 20 & 21 Vict. c. 77, s. 92. If at

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the date of a testator's death property belonging to him is situate abroad, probate duty is not payable in respect of such property, although the executors will have to deal with it as part of the estate: *Attorney-General* v. *Dimond* (1); *Attorney-General* v. *Hope*. (2)

The only question in this case is whether these shares are to be considered as property situate abroad at the date of the testator's death. Specialty debts, if out of the jurisdiction, have been held not liable to probate duty: *Commissioner of Stamps* v. *Hope*. (3) The test in each case is whether the document sought to be charged is itself the property, or whether it is only evidence of a right to the property. Shares in a company are locally situate where the head office is: *Attorney-General* v. *Higgins* (4); *In the Goods of Ewing*. (5) The same is the case with regard to a share in a foreign partnership: *Laidlay* v. *Lord Advocate*. (6) Where, however, the head office of a company is in England, shares in it are liable to probate duty: *Fernandes' Executors' Case*. (7) A bill of exchange is no specialty, and is said by Holt C.J. to be bona notabilia where the debtor is, and not where the bill is: *Yeoman* v. *Bradshaw*. (8) In this case the share certificates are only property in England in the sense that they are saleable here. They do not, however, pass the property in the shares, but are only evidence of a right to the shares.

[WRIGHT J. Is not the real question whether this case falls within the decision in *Attorney-General* v. *Bouwens*? (9)]

No doubt that case decided that probate duty was payable in respect of the bonds of foreign governments; but the ground of that decision was that it was not necessary to do any act out of this kingdom in order to render the transfer of such bonds valid. That case followed *Gorgier* v. *Mieville* (10), which had decided that the property in foreign bonds passed by delivery. That is not the case here. The evidence summarized in para-

(1) 1 C. & J. 356.
(2) 1 C. M. & R. 530.
(3) [1891] A. C. 476.
(4) 2 H. & N. 339.
(5) 6 P. D. 19.
(6) 15 App. Cas. 468.
(7) L. R. 5 Ch. 314.
(8) 3 Salk. 70.
(9) 4 M. & W. 171.
(10) 3 B. & C. 45.

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graph 8 of the special case shews that the property in such shares does not pass by delivery of the certificates, but that the certificates are only so transferable owing to a business want of caution. The transfer is only good as against the transferor by estoppel, and the transferee cannot vote or sue for the dividends in respect of such shares until he has proved the transfer and been registered on the books of the company.

The Attorney-General (*Sir R. E. Webster, Q.C.*) (with him *The Solicitor-General* (*Sir R. B. Finlay, Q.C.*), *Vaughan Hawkins*, and *Danckwerts*), for the Crown. The discussion is an academic one, as 55 Geo. 3, c. 184, has been superseded by the Finance Act, 1894 (57 & 58 Vict. c. 30).

The case is really governed by *Attorney-General* v. *Bouwens* (1), which has been cited with approval in subsequent cases: *Goodwin* v. *Robarts* (2); *Crouch* v. *Crédit Foncier.* (3) The only question is as to the property which the testator had in these shares at his death. He was possessed of certificates which, as is found by the case, were transferable by delivery. The transfers of all the certificates had either been executed or could be executed by the persons in whose names the shares stood. It was not a case where his executors would have to do anything before transferring the shares. The case is therefore precisely similar to *Attorney-General* v. *Bouwens*. (1) [He was stopped.]

Cohen, Q.C., in reply. The certificates were not saleable in this country, and it was only the certificates which were here. It was the property in the shares that was saleable, and that is situate out of the country. The executors would be liable in America to pay probate duty in respect of that property.

WRIGHT J. In this matter the case finds that the certificates, the value of which is in question in this petition of right, were documents of title held by the shareholders in certain foreign companies, which certificates certify that the person therein named is entitled to the number of shares named, and so forth. Upon every certificate there is indorsed a form of transfer and a power of attorney in blank. Then paragraph 8

(1) 4 M. & W. 171. (2) L. R. 10 Ex. 337, at p. 342.
(3) L. R. 8 Q. B. 374, at p. 384.

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repeats with regard to this case most of the judicial statements of fact or inferences of fact which were drawn in the House of Lords in the case of *Colonial Bank* v. *Cady*. (1) I think that the true inference to be drawn from the statements made in the case is that the duty has properly been claimed and paid upon these documents. It is not a matter that is susceptible of any lengthened statement; but the way I put it is this. There is in this country within the jurisdiction of the Ordinary (now the Probate Court) a document the existence of which vouches and is necessary for vouching the title of some one to the foreign share, so that in the absence of that document no one at all could establish a title to the share. It is found by the case that the certificates are currently marketable here as securities for that share and the dividends payable on that share; it is found, in fact, that the delivery of the certificate in this country ipso facto affects the title in a sense that it entitles the transferee to all the transferor's rights. It follows that the certificate itself has some operative power here, and it seems to me not to be within the ancient rule that a simple contract debt or mere evidences of a simple contract debt are supposed to exist only at the place of the debtor's residence. It being a marketable security operative, though not completely operative, to pass the title, and having a marketable value here, I think that it is itself a document which is a document of value in the hands of the executors within the jurisdiction of the Ordinary. Therefore I think that the Crown is entitled to succeed.

KENNEDY J. I agree, and for the same reasons.

Judgment accordingly.

Solicitors for suppliants: *Hollams, Sons, Coward & Hawksley.*
Solicitor for the Crown: *The Solicitor of Inland Revenue.*

(1) 15 App. Cas. 267.

A. P. P. K.

Considered. In re DEBTOR, No. 21 OF 1950 (No. 2) [1951] 1 Ch. 612

In re BASSETT. *Ex parte* LEWIS.

1895 *Dec.* 3.

Bankruptcy—Practice—Costs—Set-off—Bankruptcy Rules, 1886, *r.* 353—*Rules of the Supreme Court, Order* LXV., *rr.* 14, 27, *sub-r.* 21.

Costs of an appeal from a county court to the High Court in proceedings in the winding-up of a company cannot be set off against costs of an appeal from a county court to the High Court in bankruptcy proceedings, although the two appeals are between the same parties.

Ex parte Griffin (14 Ch. D. 37) followed.

THIS was an application which raised the question whether there could be a set-off of costs between the same parties but in different matters on appeal from a county court to the High Court.

On January 7, 1894, J. Lewis, as liquidator of a company, obtained an order in the Birmingham County Court against J. Bassett, a director of the company, for payment of a sum of money with costs. J. Bassett appealed from this order, and on April 3, 1894, his appeal was dismissed with costs by a Divisional Court of the Queen's Bench Division. J. Lewis's taxed costs of this appeal came to 14*l.* 19*s.* 4*d.*

In September, 1894, J. Lewis presented a bankruptcy petition against J. Bassett in the Birmingham County Court which was dismissed with costs. J. Lewis appealed, and on April 4, 1895, his appeal was dismissed with costs by a Divisional Court of the Queen's Bench Division, and it was ordered that the sum of 20*l.* which J. Lewis had deposited in court upon entering his appeal should be applied in payment of J. Bassett's taxed costs of the appeal, and that the balance (if any) should be returned to him or his solicitor. J. Bassett's taxed costs of this appeal came to 16*l.* 9*s.* 4*d.*, and the taxing master directed a set-off, there being also other taxed costs due from J. Bassett to Lewis in other proceedings in the Queen's Bench Division which, with the 14*l.* 19*s.* 4*d.*, amounted to about 50*l.*, and which J. Bassett had not the means to pay.

J. Bassett, however, insisted that there could be no set-off,

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and claimed to be paid his taxed costs of 16*l.* 9*s.* 4*d.* out of the 20*l.* in court.

J. Lewis now applied for an order that the 20*l.* in court might be paid out to him on the ground of the set-off directed by the taxing master, and that the order of April 4, 1895, might be varied accordingly.

Muir Mackenzie, in support of the motion. Before the Judicature Acts a set-off of costs was allowed at Common Law: *Barnes* v. *Crafter* (1); and the rule is the same since those Acts: *Blakey* v. *Latham* (2); *Edwards* v. *Hope* (3); Order LXV., rr. 14, 27, sub-r. 21.

[VAUGHAN WILLIAMS J. referred to *Barker* v. *Hemming* (4); and *Pelton* v. *Harrison*. (5)]

The rule was not the same in Chancery, and in *Ex parte Griffin* (6) costs of another court were not allowed to be set-off against costs in the Bankruptcy Court; but that was before the Bankruptcy Act, 1883, and the question is whether the principle of that decision still applies. There is no express provision in the Bankruptcy Act and Rules on the matter; but rule 353 of the Bankruptcy Rules, 1886, directs that "when no other provision is made by the Act or these rules the present law, procedure and practice in bankruptcy matters shall, in so far as applicable, remain in force. And save as provided by these rules, or rules amending the same, the rules of the Supreme Court shall not apply to any proceeding in bankruptcy." All bankruptcy matters, however, under the Bankruptcy Act, 1883, have been assigned to the Queen's Bench Division, and the Bankruptcy Court is now a branch of the Queen's Bench Division. It is submitted, therefore, that *Ex parte Griffin* (6) no longer applies: Williams on Bankruptcy, 6th ed. p. 128. The costs of these two appeals from the county court to the Divisional Court are really costs arising on judgments of the same Court in proceedings between the same parties, and it is just and right that the set-off should be allowed.

(1) 2 W. Bl. 826.
(2) 41 Ch. D. 513.
(3) 14 Q. B. D. 922.
(4) 5 Q. B. D. 609.
(5) [1892] 1 Q. B. 118.
(6) 14 Ch. D. 37.

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F. C. Willis, for J. Bassett, was not called upon.

VAUGHAN WILLIAMS J. I do not think that I ought to allow this set-off. I should much like to allow it here, because it would be a most just thing to do. But it is clear that prior to the passing of the Judicature Acts costs on the Common Law side could not be set off against costs in bankruptcy. That being so, is there anything in the Judicature Acts and Rules which has altered this practice in bankruptcy? There is no express alteration, but a power is given to the taxing master under Order LXV. to allow a set-off of costs. In my opinion that power does not apply to the practice in bankruptcy, but only relates to the costs of proceedings on the Common Law side. Then, is there anything in the Bankruptcy Act and Rules which allows this set-off? It is admitted there is no express enactment, and rule 353 provides that where there is no express provision the previous practice in bankruptcy is to apply. Inasmuch as the bankruptcy practice has not been expressly altered, I have to say whether there is anything in the fact that both these sets of costs were incurred in the Divisional Court, when sitting to hear appeals from the county court, which enables me to allow this set-off. I think not; and until there is some express provision, I think I ought to take care that the costs of appeals in bankruptcy from county courts are kept distinct and follow the old rule in bankruptcy, and not allow them to be set off against costs incurred between the same parties in other proceedings in another court. Proceedings in bankruptcy are very special proceedings, and may have the effect of altering a debtor's status, and therefore, perhaps, it is not unreasonable that the costs of such proceedings should be kept distinct and not allowed to be set off. This application therefore fails, and must be dismissed with costs.

Solicitors for applicant: *Harvey & Capron, for E. C. Newey, Birmingham.*

Solicitor for defendant: *F. Hatton, for Goodrick-Clarke & Smith, Birmingham.*

H. L. F.

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Jan 15.

THE COMMITTEE OF LONDON CLEARING BANKERS *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamps—Bill of Exchange—Order on Banker to transfer in account —Exemption—Bill drawn for sole purpose of Remitting Money to be placed to any Account of Public Revenue—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 32; *First Sched. tit.* "*Bill of Exchange*," *Exemption* 10.

A firm of bankers in London, having an account at the Bank of England, for the purpose of enabling its customers to pay customs duties on goods otherwise than in cash, issued a document addressed to the cashiers of the Bank of England and directing them to transfer from the account of the bankers to the account of the Commissioners of Customs a sum named therein. This document was dealt with in one of two ways: (1.) it was handed by the bankers to their customer in exchange for his cheque for the same amount, and given by him to the Commissioners of Customs, who handed it to the Bank of England; or (2.) it was handed direct by the bankers to a customs officer in exchange for their customer's cheque, and subsequently handed by the Commissioners of Customs to the Bank of England:—

Held, that the document was a bill of exchange payable on demand within the meaning of s. 32 of the Stamp Act, 1891, and that it was not exempt from duty as being a "bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue" within the meaning of the 10th exemption under the head "Bill of Exchange" in the first schedule to that Act. That exemption applies only to bills drawn for the sole purpose of remitting and placing to its proper account money which is already public money.

CASE stated by the Commissioners of Inland Revenue under the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13.

Two instruments, described as instrument No. 1 and instrument No. 2, had been presented to the commissioners for their opinion as to the stamp duty chargeable; they were identical in terms, and differed only in the use that was made of them. The following is a copy of one of the instruments:—

"046713 "Public Revenue,
"London, August 31, 1894.

"To the cashiers of the Bank of England.

"Transfer from our Account to the Account of
The Commissioners of Customs.

"Two hundred and twenty-five pounds 16*s.* 7*d.*
"225*l.* 16*s.* 7*d.*
"o/a Barclay Bevan Tritton Ransom Bouverie & Co.
"W. B. Pearmain."

The instrument bore upon it two impressions from a rubber stamp containing respectively words and figures as follows :—

"Duty paid . . 31.8.94 . . 940 . . Collector
Duty paid . . 31.8.94 . . 922 . . Collector."

These impressions were the official marks of an officer of customs.

Instrument No. 1 was a transfer order of Messrs. Barclay & Co. from their account with the Bank of England to the account of the Commissioners of Customs with the Bank of England, and was handed by Messrs. Barclay & Co. to a customer in exchange for his cheque on them for the amount of customs duty on goods requiring to be cleared at the Custom House, and was handed by the customer to the Commissioners of Customs, by whom it was delivered to the Bank of England.

Instrument No. 2 was a similar transfer order which was delivered by Messrs. Barclay & Co. to an officer of customs in exchange for their customer's cheque on them for the same sum, being also the amount of customs duty on goods requiring to be cleared; the order was subsequently delivered by the Commissioners of Customs to the Bank of England.

On August 9, 1894, the Commissioners of Inland Revenue had issued a circular to bankers drawing their attention to the fact that, when passing money to the account of that revenue by draft of transfer from an account at the Bank of England, or by ordinary draft, bankers omitted to stamp the draft, and pointing out that exemption No. 10 under the head "Bill of Exchange" in the schedule to the Stamp Act, 1891, was confined to the remittance of money which was money standing to a revenue account prior to admittance, and that they would not accept any such draft as was referred to when unstamped. Each of the instruments had been stamped in compliance with the requirements of the circular with the duty of one penny as

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being bills of exchange payable on demand, and the Commissioners of Inland Revenue expressed their opinion that each of the instruments was a bill of exchange payable on demand within the meaning of the Stamp Act, 1891, and was properly stamped with the duty of one penny.

The Committee of London Clearing Bankers expressed themselves dissatisfied with this determination on the grounds—firstly, that the instruments were not bills of exchange within the meaning of the Stamp Act, 1891; and secondly, that if they were, they fell within the exemption No. 10 under the head "Bill of Exchange" in the first schedule to the said Act in favour of "bills drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue."

The commissioners therefore stated the present case, in which the question for the opinion of the Court as respects each of the instruments was whether it was chargeable with the duty of one penny applicable to a bill of exchange payable on demand, or, if not, whether it was liable to any duty, or whether it was exempt from duty.

Cohen, Q.C. (*H. Tindal Atkinson*, with him), for the appellants. First, the instrument is not a bill of exchange within the meaning of s. 3 of the Bills of Exchange Act, 1882; it is not an order for the payment of a sum of money at all, but merely a direction to transfer in account. Secondly, it is for the same reason not a bill of exchange within the meaning of s. 32 of the Stamp Act, 1891; it is nothing more than an assignment of debt within the principle of *Buck* v. *Robson*. (1)

[WRIGHT J. Is it not precisely the same as drawing a cheque on one's banker in favour of a person who also banks there?]

The effect may be the same, but the cheque is an order for the payment of a sum of money. This instrument does not entitle any person to draw upon any other person for any sum of money within the meaning of s. 32. It did not entitle the commissioners to obtain payment of the sum named in it, and

(1) 3 Q. B. D. 686.

created no legal obligation on the Bank of England to make the transfer directed in it to be made. It operated as a mere request to the Bank to make the transfer.

[KENNEDY J. Suppose the transfer had been carried out by means of instrument No. 1, would it have supported a plea of payment?]

No; only a plea of transfer by third parties which had been accepted in accord and satisfaction.

Thirdly, if the instrument is a bill of exchange within the meaning of the Stamp Act, 1891, it comes within the 10th exemption under the head "Bill of Exchange" in the first schedule to that Act as being a "bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue."

[He was stopped by the Court.]

Sir R. E. Webster, A.-G. (*Danckwerts*, with him), for the respondents, was directed to confine his argument to the last point. The instrument is not used for the "sole" purpose of remitting money to be placed to an account of public revenue; in each case it is used for the purpose of enabling the merchant to obtain a discharge from the customs without paying cash. But, further, the exemption was introduced into the Act with reference to a known state of things, and a consideration of the history of the statutes dealing with the remitting of money by officers of the various departments of the revenue will shew that the exemption applies only to money which is already public revenue in the hands of collectors in various parts of the country, and has to be remitted by them, or by the local bankers in whose hands they have placed it, to London to be placed to the proper account; the word "remitting" has in statutes dealing with the revenue a technical meaning. [He referred to the following statutes: 7 & 8 Geo. 4, c. 53, ss. 44–49; 1 & 2 Wm. 4, c. 18, ss. 8–10; 43 & 44 Vict. c. 19, s. 78; 53 & 54 Vict. c. 8, s. 21; 53 & 54 Vict. c. 21, ss. 15–19; 54 & 55 Vict. c. 24.]

Cohen, Q.C., in reply. This is a taxing statute, and the appellants must therefore be brought within the strict letter of the law, as laid down by Lord Cairns in *Partington* v.

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Attorney-General. (1) There is no reason for giving a technical meaning to the word "remit"; in commerce it means simply to send money. A comparison of the 9th and 10th exemptions shews a strong distinction between them: the 9th is confined to drafts or orders drawn upon a banker "by an officer of a public department of the State" for the payment of money out of a public account; while the 10th exemption applies to all bills drawn for the specified purpose without saying by whom the bills must be drawn. The contention of the Crown requires the insertion in the 10th exemption of the words "by or on behalf of any officer of customs" or equivalent words.

WRIGHT J. I am of opinion that the Crown is entitled to judgment. These documents are, I think, not bills of exchange at common law, nor bills within the meaning of the Bills of Exchange Act, though we have not to decide that question. But it appears plain to me that they are bills within the meaning of s. 32 of the Stamp Act, 1891, which is extremely wide, and includes a draft, order, cheque, letter of credit, and any document purporting to entitle any person to the payment of any sum of money, and a bill of exchange payable on demand (which this document apparently is) includes an order for payment of any sum of money out of any particular fund which may or may not be available. These words seem to me to entirely cover this case. I cannot understand in what sense a transfer in account is not a payment when it is made, or how an order for such a transfer is not an order for payment. The real question is whether the case comes within the 10th exemption under the head of "Bills of Exchange" in the schedule to the Act. I entirely agree with the learned counsel for the appellants when he says that the Court cannot go a hair's-breadth beyond the letter of the enactment in favour of the Crown; but by that I understand that, if something is not within the letter of an enactment, one must not say, in favour of the Crown, that it comes within its spirit; the enactment must not be enlarged in any way, and it must not receive a benevolent construction in favour of the Crown. But that does

(1) L. R. 4 H. L. 100, at p. 122.

not disentitle the Court to have regard to every legitimate means for ascertaining what is the legal sense in which the words are used. If there be, as I think there is here, an ambiguity which is not latent but patent, according to the old distinction, that is not a matter to be solved by evidence as to the meaning of the parties—in a case, that is, where there could be parties—it is to be solved by the Court as a matter of construction. In construing the words in the present case the Court has a right to look to the surrounding circumstances—to the facts which must have been known to the Legislature when the statute was passed—above all, to the language of the class of statutes of which this is one. Looking, then, at the words by themselves, "a bill drawn for the sole purpose of remitting money to be placed to any account of public revenue," I was inclined until I heard the Attorney-General's argument to agree with the contention of the appellants; but upon consideration I think that the natural meaning of those words is money which has ceased to be private money, and which is sent, not so much for the purpose of paying it to the Crown, as because it already has been paid to somebody for the Crown and has to be remitted by the officer, or by the bank into which he has paid it, to be placed to the proper account of the public revenue. I think that the language of the exemption is less appropriate to the case of an actual payment than to the case of remitting that which is already public money. If that is so, the argument for the appellants fails, because these documents are not bills drawn for the purpose of placing to public funds money which is already public, but for the purpose of paying for the first time that which until it was so paid was private money. I think that is the natural meaning. If that is the proper view to take, there is no need to read in any such words as "drawn by a collector or public officer" at all. Certainly if it were necessary to read in these, or equivalent words, I should be inclined to decline to do so; but I think it is unnecessary.

Then, if we look at the history of the matter, this enactment is traced to the Customs and Inland Revenue Act, 1890, and it becomes historically part of a series of enactments which deal

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with remittances of public money by public officers and accountants, using, as it seems to me, the words "remitting" and "remittance" more or less as words of art. That is a matter which I think we may, and ought to, consider in construing this exemption. I think, also, that the same rule of noscitur a sociis applies in another form, because the previous five or six exemptions which this exemption immediately follows are all exemptions having relation to documents drawn by public officers when dealing with public money.

On all these grounds I am of opinion that the contention of the Crown is right, and that our judgment should be for the Crown.

KENNEDY J. I agree, and for the same reasons.

Judgment for the respondents.

Solicitors for appellants: *Murray, Hutchins, Stirling & Murray.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

W. J. B.

1896

Jan. 13.

THE QUEEN *v.* EVANS AND OTHERS.

Bastardy—Jurisdiction—Absence from England of alleged Father—Ceasing to reside in England within the Twelve Months next after the Birth—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict. c.* 65), *s.* 3.

By s. 3 of the Bastardy Laws Amendment Act, 1872, an affiliation summons may be applied for either before the birth of the child "or at any time within twelve months from the birth of such child . . . . or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child."

The alleged father of a bastard child left England about a month before the child's birth and did not return till the child was fifteen months old. The mother then took out a summons which was dismissed for want of jurisdiction on the ground that the summons was out of time:—

Held, that the alleged father ceased to reside in England during the whole period of his absence; that he was therefore a person who had

"ceased to reside in England within the twelve months next after the birth of such child" within the meaning of s. 3 of the Act of 1872, and that the justices had jurisdiction to adjudicate upon a summons taken out within twelve months after his return.

RULE NISI to justices of Anglesey and to one Parry to shew cause why an order in the nature of a mandamus should not issue commanding the justices to hear and determine the matter of an affiliation summons obtained by one Margaret Hughes against Parry.

The affidavits shewed that on January 30, 1894, Margaret Hughes was delivered of an illegitimate child, of which she alleged Parry, the respondent, to be the father; and in March, 1894, she applied for and obtained an affiliation summons against him. Parry, who was the mate of a ship, had left England on December 28, 1893, a month before the child's birth, and did not return until April, 1895, when the summons was duly served upon him. The summons, which had been adjourned until Parry's return, was eventually heard on May 6, 1895, when it was dismissed on the ground of the want of sufficient corroborative evidence. On May 7, 1895, a fresh summons was applied for by Margaret Hughes, which came on for hearing on May 20, when the objection was taken on behalf of Parry that the justices had no jurisdiction to hear it on the ground that the application for the summons was out of time. The justices upheld the objection and dismissed the summons.

E. Honoratus Lloyd, for the respondent Parry, shewed cause. The objection was good. The summons not having been applied for within twelve months after the birth of the child, it was necessary for the applicant to shew that the respondent ceased to reside in England within the twelve months next after the birth. The respondent, however, ceased to reside in England before the child was born. The expression "ceased to reside" must be interpreted with regard to the date at which the respondent quitted England.

[HAWKINS J. The proper construction of the section seems to be that the respondent ceased to reside in England during the whole of the time that he was away.]

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It is submitted that he ceased to reside in England on the day he left the country.

W. Mackenzie, for the applicant, was not called on to argue.

HAWKINS J. For the reason given during the argument, I think that the point raised by the respondent is quite untenable. The order must therefore be made absolute.

LAWRANCE J. I am entirely of the same opinion.

Order absolute.

Solicitors for applicant: *Peacock & Goddard, for Dew, Bangor.*

Solicitor for respondent: *W. Thornton Jones, Bangor.*

W. J. B.

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Jan. 18.

In re GALWEY.

Criminal Law — Extradition — Surrender of British Subjects—Treaty with Belgium—Person "liable to be surrendered" — Extradition Act, 1870 (33 & 34 *Vict. c.* 52), *s.* 6.

By s. 6 of the Extradition Act, 1870, "where this Act applies in the case of any foreign State, every fugitive criminal of that State, who is in or suspected of being in any part of Her Majesty's dominions . . . . shall be liable to be apprehended and surrendered in manner provided by this Act."

By a treaty made between this country and Belgium the contracting parties undertook to deliver up to each other reciprocally fugitive offenders accused of certain specified offences; but it was expressly provided that "in no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalization."

The surrender of a British subject was demanded by the Belgian Government in respect of certain extradition offences of the commission of which there was sufficient primâ facie evidence to justify his extradition, and an order for his committal was made by a magistrate with a view to his surrender:—

Held, that the accused, although a British subject, was a person "liable to be surrendered" within the meaning of s. 6 of the Extradition Act, 1870, and that the order of committal was rightly made.

Under the provisions of the treaty with Belgium, the ordinary proceed-

ings in extradition may be taken in the case of a British subject; it is not necessary that in each particular case the surrender should be the result of negotiations between the respective Governments and of an express consent by the British Government to the extradition.

A RULE NISI had been obtained on behalf of F. R. Galwey for a habeas corpus to bring up his body in order that he might be discharged from custody. The extradition of the prisoner had been demanded by the Belgian authorities on a charge of receiving valuable securities, knowing them to have been stolen, and he had been committed by Sir John Bridge, the chief magistrate of the metropolis, with a view to his surrender. It was admitted that there was sufficient primâ facie evidence of the commission of an extradition offence to justify the surrender of the prisoner, if in other respects he was liable to be surrendered; but it was contended that he was a British subject, and that therefore there was no jurisdiction to make the committal order with a view to his extradition. The learned magistrate was of opinion that the prisoner was a Belgian subject; but it was admitted at the outset of the present argument that he was a British subject, although possessed of a Belgian domicil.

By s. 2 of the Extradition Act, 1870 (33 & 34 Vict. c. 52), "where an arrangement has been made with any foreign State with respect to the surrender to such state of any fugitive criminals, Her Majesty may, by Order in Council, direct that this Act shall apply in the case of such foreign State."

By s. 6, "where this Act applies in the case of any foreign State, every fugitive criminal of that State who is in or suspected of being in any part of Her Majesty's dominions . . . . shall be liable to be apprehended and surrendered in manner provided by this Act. . . ."

By treaty between Her Majesty and the King of the Belgians, dated May 20, 1876, it was agreed in article 1 that the high contracting parties should, on requisition made in their name by their respective diplomatic agents, deliver up to each other reciprocally any persons [except as regards Great Britain native-born and naturalized subjects of Her Britannic Majesty, and, except as regards Belgium, those who are by

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birth or who may have become citizens of Belgium] who being accused or convicted as principals or accessories of certain specified crimes committed within the territories of the requiring party, should be found within the territories of the other party. By an Order in Council it was directed that the Extradition Acts should apply in the case of this treaty from August 4, 1876.

By a declaration between the British and Belgian Governments, signed on April 21, 1887, for amending article 1 of the treaty of 1876, the words appearing above in brackets were suppressed, and the following paragraph was added to that article: "In no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalization." The Extradition Acts were applied to this declaration from May 30, 1887, by Order in Council.

Sir R. E. Webster, A.-G. (*Sir R. B. Finlay, S.-G.*, and *H. Sutton*, with him), shewed cause. It is admitted that the prisoner is in fact a British subject; he can, nevertheless, be extradited under the terms of the treaty with Belgium. The treaty of 1876 with that country did, no doubt, contain an exception which prevented the extradition of British subjects; for, under very similar excluding words in the treaty with Switzerland, the case of *Reg.* v. *Wilson* (1) was decided in 1877, where the Court expressed regret that they were prevented by the terms of that treaty from surrendering a British subject accused of offences in a foreign country. In consequence, no doubt, of that decision, and of the expression of opinion by the Court, the declaration of 1887 was signed between the British and Belgian Governments. The language of that declaration is practically the language used by Field J. at the end of his judgment in *Reg.* v. *Wilson* (1), and its effect is not to create or to continue a prohibition against the surrender of a British subject, but to vest in the executive government a discretion as to such surrender.

Bower, for the prisoner. The prisoner is entitled to be dis-

(1) 3 Q. B. D. 42.

charged. It is not necessary for him to shew that the British Government is prohibited from handing him over; on the other hand, the Crown must shew that it is compelled to do so. He is detained in prison on the theory that he is a person liable to be surrendered under s. 6 of the Extradition Act—that is, that he is a person who must be surrendered, if the proper formalities are complied with; but in the case of British subjects there is no treaty obligation which compels their surrender by this country. As a British subject the prisoner owes allegiance to the Queen, in return for which he is entitled to her protection, for nationality involves a "duplex ligamen"; the Crown, therefore, not being bound to surrender him, there is no right, as between the Crown and the prisoner, to hand him over as a person liable to be surrendered. The case with regard to a British subject is precisely the same as though there were no treaty at all. It is true that the Government may assent to the surrender of a British subject; but that must be a matter of negotiation between the respective Governments.

[KENNEDY J. Do you say that there must be an express consent by the British Government in each individual case?]

Yes. Had there been negotiations between the two Governments in this particular case and an assent to the prisoner's surrender, it would be difficult to contend that he was not lawfully in prison with a view to his surrender; but that course has not been adopted. The requisition made by the Belgian Government was made as a demand of a treaty right, and was not a request to the British Government to do something which they were not bound to do; and the prisoner, being in prison in consequence of such demand as a person "liable to be surrendered," is illegally detained in custody, and is entitled to his remedy by way of habeas corpus.

LORD RUSSELL of KILLOWEN C.J. I am of opinion that this rule must be discharged. I assume for the purposes of the day, for it has not been questioned, that the offence in respect of which the prisoner is detained under an order of committal is one within the treaty and the Extradition Acts. It must also be assumed that he is a British subject, and, further, that the

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demand for his extradition is assented to and supported by the executive government of this country.

The question for our determination turns upon the construction of the Extradition Act, 1870, into which, and in connection with which, are to be read the terms of the treaty. Now the treaty, originally made in 1872, was modified in 1876, and, as modified, it contained this stipulation: "it is agreed that Her Britannic Majesty and His Majesty the King of the Belgians shall on requisition made in their name by their respective diplomatic agents deliver up to each other reciprocally any persons"—then follow these words, for which I cite the passage—"except as regards Great Britain, native-born and naturalized subjects of Her Britannic Majesty." Now, as the treaty then was, assuming that *Reg.* v. *Wilson* (1) was properly decided, the Extradition Act would not have authorized the extradition of the criminal, because from the liability to extradition were excepted native-born and naturalized subjects of the Queen. That *Reg.* v. *Wilson* (1) decides, and, I think, rightly decides. I do not stop to inquire whether, even if the treaty did not apply, there might not have been some other steps taken by the executive government with a view to extradition. That being the original form of the treaty, it was subsequently altered, and it is quite probable, as was suggested by the Attorney-General in argument, that it was altered because of the decision of *Reg.* v. *Wilson* (1), or other decisions to the same effect; for in *Reg.* v. *Wilson* (1) Cockburn C.J. expresses regret that this country should not be enabled under the extradition law then existing to deliver up in proper cases even British subjects who have offended against the laws of another country. Accordingly, in 1887, the treaty was designedly altered; the excepted words—that is to say, the exception which excluded native-born and naturalized subjects of the Queen altogether from extradition under the statute and the then existing treaty—were altered thus; the words I have mentioned were excluded, and the following substituted: "In no case nor on any consideration whatever shall the high contracting parties be bound to surrender their own subjects

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whether by birth or naturalization." What does that mean? It surely means that, while they are not bound, they may under the treaty and any legal enactment which relates to the treaty make such extradition.

Then we turn to the Extradition Act, 1870, the statute in connection with which the treaty has to be construed. Sect. 6 of that Act, which is the section to which the learned counsel for the prisoner principally addressed himself, provides that where the Act applies in the case of any foreign State—and it applies in the case of Belgium—every fugitive criminal of that State who is in, or suspected of being in, any part of Her Majesty's dominions or that part which is specified in the Order in Council applying the Act, as the case may be, shall be liable to be apprehended and surrendered in manner provided by the Act. The learned counsel contends that in the present case the prisoner was not so liable. It seems to me, however, that he clearly was. One may conceive the case of a Secretary of State being applied to in a given case, in which it was notorious that the person against whom the application was made was a British subject; and further, that the circumstances under which he was charged with having committed a crime were such that, in the clear opinion of the Secretary of State, the executive government ought not to assent to his extradition and ought not to exercise that power which the treaty and the Act conjointly give: in such a case it clearly would be within his competence to say, "I shall not assist the extradition of this particular alleged criminal." In this case, however, what the Secretary of State did was to sign a warrant in conformity with the terms of the first form in the second schedule to the Extradition Act. That form is addressed to the chief magistrate of the metropolis; it recites the treaty arrangement and the Order in Council applying the Act; it states that a requisition has been made to one of the principal Secretaries of State by diplomatic representatives for the surrender of a particular person; then it proceeds: "Now I hereby by this my order under my hand and seal signify to you"—that is, the chief magistrate —"that such requisition has been made, and require you to issue your warrant for the apprehension of such fugitive, provided

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that the conditions of the Extradition Act, 1870, relating to the issue of such warrant, are in your judgment complied with." It seems to me that that is as clear and distinct an assent on the part of the representative of the executive government to the demand for extradition as can possibly be, and I decline entirely to give any effect to the argument of the learned counsel for the prisoner which, as I understand it, may be compendiously stated thus. He does not deny that there might be such a requisition made by the diplomatic representatives of the demanding power to the executive government here; but the suggestion is that that must be shewn to have been a formal demand, and that the assent must have been given by the Secretary of State in some other way than by signing the form of order to the chief magistrate which I have just cited. I do not for one moment mean to convey that the Secretary of State, having given that order to the chief magistrate, may not, when at a later stage he becomes more fully aware of the facts of the case, withdraw that assent, and interpose even at a later stage and say that it is not a case in which the executive government think that extradition ought to be granted; nay, more, I am far from saying that at any moment before the accused is handed over to the foreign Government it is not perfectly open to those representing him to make representations to the Crown if reasons exist why his surrender should not be granted. All these, however, are matters of a political complexion; they are not matters which in any way enter into the duty of the judiciary to determine. The prisoner then, having been taken into custody under the warrant of the chief magistrate, was brought before him, and we should, after the order of committal, be entitled to review the magistrate's decision, not in the sense of entertaining an appeal from it, but in the sense of determining whether there was evidence enough to give him jurisdiction to make the order of committal: I mean evidence of the offence and of other necessary conditions for the application of the Act when the chief magistrate made the order of committal under which the prisoner is now in custody. It seems to me that the only ground on which this habeas corpus can be successfully maintained is that the committal order was made without juris-

diction and was illegal. I see no ground or pretence whatever for any such contention, and I think that the application is not in any sense well founded.

Lastly, upon the argument of the case before us the executive government of the country appears in the only way in which they can be represented in our courts, that is, by the recognised law officers of the Government of the day. They are here expressing the desire of the Government that this extradition shall take place; and it seems to me that it is impossible for us to go beyond that and to entertain any considerations which may or may not, if they exist, be properly addressed in another quarter. On these grounds I think that this application entirely fails. I would say in passing that, without entering into a more detailed examination of the argument on behalf of the prisoner, it is perfectly obvious that its whole tenor is in contravention of the decision in *Reg.* v. *Wilson* (1); indeed, in one passage of his judgment Field J. contemplates the very case that has now arisen. He is pointing out that in that particular case, as the treaty with Switzerland then stood—it has since been altered—extradition of British subjects was excluded, and he points out how different the result of the decision of the Court would have been if there had not been an exclusion, but if the case had been one in which an option, so to speak, was left to the Government, because he says: "Is there not in this very treaty an exception? It is not that one country shall not be bound to deliver up, but that no subject shall be delivered up to the other country." For the reasons I have given I think that this rule must be discharged.

WRIGHT and KENNEDY JJ. concurred.

Rule discharged.

Solicitor for the Crown: *Solicitor to the Treasury.*
Solicitor for defendant: *Joseph Davis.*

(1) 3 Q. B. D. 42.

W. J. B.

C.A.
1896
Feb. 7.

[IN THE COURT OF APPEAL.]

DRAX *v.* FFOOKS.

Local Government—Parochial Elector—Ownership—Qualification—Woman—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *ss.* 2, 43, 44.

A woman, whether married or single, is not qualified by reason of ownership of property to be a parochial elector.

APPEAL from the judgment of a Divisional Court dismissing an appeal from the decision of a revising barrister disallowing the claim of a married woman to be on the register of parochial electors in respect of the ownership of property.

The facts are stated in the report of the case in the Court below. (1)

C. Dodd, Q.C., and *A. Macmorran*, for the appellant. Boards of guardians and district councils are, under the Local Government Act, 1894, to be elected by the parochial electors: see ss. 20–24. Women, if unmarried, were qualified in respect of the ownership of property to vote for boards of guardians and urban sanitary authorities prior to the Local Government Act, 1894. It cannot have been intended to deprive them of that franchise by the Act. A man may get a vote as a parochial elector in respect of ownership; and, if a woman cannot, she is to that extent disqualified by reason of her sex, which does not appear to have been the intention of the Legislature.

By s. 63 of the Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), a woman is qualified to vote at a municipal election; and by ss. 2–4 of the County Electors Act, 1888 (51 & 52 Vict. c. 10), the burgess qualification was extended to rural parishes. It is provided by s. 3, sub-s. 1, of the Local Government Act, 1894, that the parish council shall be elected from among the parochial electors of the parish, or persons who have resided for twelve months in the parish or within three miles thereof; and by sub-s. 2, "No person shall be disqualified by sex or marriage for being elected or being a member of a parish council." Sect. 43

(1) Ante, p. 1.

provides that for the purposes of the Act a woman shall not be disqualified by marriage for being on any local government register of electors, or for being an elector of any local authority; and the proviso that a husband and wife shall not both be qualified in respect of the same property seems to assume that a woman may be qualified in respect of ownership. Sect. 44 provides for a separate list of parochial electors, which is to form part of the register of parochial electors. By sub-s. 8, the law relating to the register of electors is with the necessary modifications to apply to this list; and by sub-s. 9, any person may claim for the purpose of having his name entered in the parochial electors' list, and the law relating to claims to be entered in lists of voters shall apply. It is contended that from these provisions it sufficiently appears that the intention was that a woman might claim a vote in respect of ownership as a man could do in the case of the parliamentary list, and she is then to be placed on the separate list; and by s. 43, the fact that such a woman is married is to be no disqualification.

Boydell Houghton, for the respondent. It clearly appears from s. 2, sub-s. 1, of the Act, and from s. 44, that only those persons are entitled to vote as parochial electors who are either on the local government register or the parliamentary register of electors. (1) A woman is qualified to be on the former if she is an occupier; but ownership is not a qualification to be on that register. A woman is not qualified to be on the parliamentary register. Sect. 43 only prevents a woman who would otherwise be qualified from being disqualified by marriage. It is not a qualifying section. The provisions of s. 44, on which reliance has been placed by the appellant, are merely registration machinery dealing mainly with the cases of persons entered in respect of several qualifications. They are not provisions creating qualifications. If the appellant's construction of s. 43 is correct, a married woman would be qualified in respect of ownership, while a single woman would not.

C. Dodd, Q.C., in reply.

(1) For the meaning of "local government register of electors" and "parliamentary register of electors," see Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 17.

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DRAX v. FFOOKS.

LORD ESHER M.R. In this case the appellant, a married woman, claimed to be placed on the parochial electors' list for a parish in respect of the ownership of property in that parish. The question whether she had a right to be placed on that list depends entirely on the provisions of the Local Government Act, 1894, under which parochial authorities are constituted. It was argued on her behalf that she had a right to be placed on the list by virtue of s. 43 of that Act. But that section does not give a qualification: it only provides that, if a woman is otherwise qualified, the fact that she is married shall not be a disqualification. The word "property" at the end of the section does not import that a woman may have a qualification by ownership. It means the subject-matter, namely, the house or land, in respect of which a qualification may arise. We must therefore look elsewhere to see whether the appellant is qualified to be placed on the parochial electors' list. The section upon which the qualification depends is s. 2, which defines parochial electors as being "the following persons, . . . and no others, namely, the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish." We have therefore to see what persons are qualified to be either on the local government register or on the parliamentary register of electors. The persons who are qualified to be on the local government register are occupiers. Therefore, if a woman is an occupier within the parish, she may be qualified to be on the local government register; and s. 43 provides that in that case she shall not be disqualified for the purposes of the Act because she is a married woman; but she cannot be qualified to be on the local government register in respect of the ownership of property. Then, with regard to the parliamentary register, no woman, whether married or single, can be on that register. Therefore, by reason of her not being an occupier, the appellant is not entitled to be on the local government register, and, by reason of her being a woman, she is not entitled to be on the parliamentary register. Then, when we come to s. 44 we find that it is provided that the local government register of electors and the parliamentary register of electors, so far as they relate

to a parish, shall together form the register of the parochial electors of the parish, and that only persons whose names are in that register shall be entitled to vote as parochial electors. The effect of our construction of the Act is not, properly speaking, to disqualify a married woman, for no woman is qualified under the Act by reason of ownership. For these reasons the appeal must be dismissed.

LOPES L.J. I am of the same opinion. The appellant claims to be put on the parochial electors' list for a parish. She is the owner of property, but is not an occupier within the parish. It becomes material in the first place to consider how the list of parochial electors is formed. Parochial councils are constituted under the Local Government Act, 1894, and from what sources the electorate under that Act is drawn appears from ss. 2 and 44 of the Act. Sect. 2 defines parochial electors as being the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish. The terms of s. 44 make the matter, if possible, clearer still; for it provides that the local government register of electors and the parliamentary register of electors, so far as they relate to a parish, shall together form the register of the parochial electors of the parish, and no person whose name is not in that register shall be entitled to vote as a parochial elector. It is said that s. 43 militates against the view we are taking. That section provides that "for the purposes of this Act a woman shall not be disqualified by marriage for being on any local government register of electors, or for being an elector of any local authority, provided that a husband and wife shall not both be qualified in respect of the same property." By the word "property" in that section I understand to be meant merely the house or land in respect of which a woman may be qualified. That section removes for the purposes of the Act any disqualification arising from marriage, in the case of a woman who is otherwise qualified, but does no more. The appellant's counsel relied upon s. 3, sub-s. 2, of the Act, which provides that no person shall be disqualified by sex or marriage for being elected or for

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Lopes L.J.

being a member of a parish council. But that sub-section merely provides that certain things shall not disqualify a person from being elected. It has nothing to do with the qualification of electors. The appellant, not being an occupier, is not entitled to be on the local government register, and, being a woman, is not entitled to be on the parliamentary register. Inasmuch as she is not entitled to be on either of those registers, it appears plain upon the terms of the Act that she is not entitled to be on the parochial electors' list. It was urged that this construction of the Act would have the effect of disfranchising in some cases women who previously to the Act were entitled, as owners of property, to vote for local boards and boards of guardians. But, assuming that to be so, we have nothing to do with any such consideration. We have simply to construe the words of the Act as we find them.

RIGBY L.J. This appears to me a very plain case. Glancing at the state of things which existed before this Act was passed, we find that there was then a register known as the local government register, which was the register of electors for the county council or town council. The right to be upon that register was gained by occupation, and ownership of property would not give it. There were, however, important local government elections with regard to which the local government register had no application. There were the elections of poor law guardians and of local boards of health, to which a wholly different scheme of voting applied. Plural voting was in those elections allowed, and ownership of property constituted a qualification. The existing qualifications with regard to the election of those bodies were abolished by the Act, and to that extent it is undoubtedly a disfranchising Act, the scheme of the Act being to transfer the right of electing those bodies to the parochial electors. But for the reference to the parliamentary register in ss. 2 and 44, some occupation qualification would in all cases have been necessary in order to entitle a person to be placed on the parochial electors' list, and there would have been a pure, uniform occupation franchise. If the fact that ownership would not in that case have been a qualification can be called a

disqualification, it is one which would have been shared by men as well as by women. It seems to have been thought that it would be strange that persons in the parish who were entitled to vote for members of parliament should not be entitled to vote for the members of the small local parliament, and to prevent that anomaly it was provided that those on the parliamentary register should be entitled to vote as parochial electors. Under the existing law, the vast majority of voters would have the occupation franchise; so this provision really only affects the comparatively small number of those who have the parliamentary franchise but not the local government franchise. It was with a view to them, I think, that the provision was made that, to make up the parochial electors' list, the parliamentary register of electors should be added to the local government register. From the nature of this latter register, no man or woman is entitled to be upon it by reason of ownership, and no woman is entitled to be upon the parliamentary register. So the Act cannot be said to disqualify a woman by reason of her sex, as was contended. The Act only leaves her disqualified from being on the parliamentary register as she was before. She is entitled to get upon the local government register by occupation like other persons. She is merely precluded by reason of not being qualified to be on the parliamentary register from getting on to the parochial electors' register by that avenue. It has been pointed out in argument that it is impossible to imply a qualification in the case of a married woman which would not exist in the case of a single woman. For these reasons I think that the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Bell, Brodrick & Gray, for Parker, Blandford.*

Solicitors for respondent: *Robins, Hay & Co., for E. Archdall Ffooks, Sherborne.*

E. L.

1896
Feb. 11.

PEARSON, Appellant; THE BELGIAN MILLS COMPANY, Respondents.

Factory Acts—Employment of Children—Cleaning Machinery—Factory and Workshop Act, 1878 (41 & 42 *Vict. c.* 16), *s.* 9.

By s. 9 of the Factory and Workshop Act, 1878, "a child shall not be allowed to clean any part of the machinery in a factory while the same is in motion by the aid of steam, water, or other mechanical power":—

Held, that "the same" meant "the machinery" and not the "part" cleaned; so that this section prohibited allowing a child, while a machine was in motion, to clean any fixed part, which did not move, of the machine.

Case stated by justices of the county of Lancaster under the Summary Jurisdiction Acts.

The appellant, one of Her Majesty's inspectors of factories, preferred a complaint before the justices at petty sessions, alleging that the respondents, being occupiers of a factory within the meaning of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), did, in contravention of s. 9 of that Act, allow a certain child, J. T. Foster, to clean a part of the machinery while the same was in motion by the aid of steam.

The following facts were proved or admitted at the hearing:—

The respondents are cotton spinners, and carry on business at the Belgian Mills at Royton, in the county of Lancaster. The child, Foster, was eleven years old. He was employed at the respondents' mill as a "little piecer." On the day charged in the complaint he was seen by the appellant cleaning the front part of the roller beam of a machine called a spinning mule. The roller beam is a fixed part of the machine. The machine was in motion by steam power.

The justices found that the part of the machine which the child was cleaning was not in motion, but that the machine of which part was being cleaned was in motion. They also found as a fact that the cleaning in question was not dangerous.

They were of opinion that s. 9 of the Factory and Workshop Act, 1878, does not prevent the cleaning by a child of a fixed part of a running machine, and they accordingly dismissed the complaint.

The question for the opinion of the Court was, whether s. 9 applies to the cleaning by a child of the fixed part of a machine in motion by steam, water, or other mechanical power.

Henry Sutton, for the appellant. The intention of the Legislature in passing s. 9 was to prevent young children being employed about machinery in motion. The word "same" in that section means "the machinery," not the "part" cleaned. An offence against the statute is committed if a child be allowed, while a machine is running, to clean any fixed part, which does not move, of the machine.

No counsel appeared for the respondents.

LINDLEY L.J. The question in this case depends upon the true construction of s. 9 of the Factory and Workshop Act, 1878. The first paragraph provides that "a child shall not be allowed to clean any part of the machinery in a factory while the same is in motion by the aid of steam, water, or other mechanical power." The machine in question was a spinning machine, some portion of which was in motion and another portion was fixed. The child was not cleaning the part which was in motion, but was cleaning, while the machine was in motion, the fixed part. The question turns on the word "same" in s. 9. I am clearly of opinion that "same" means "the machinery" and not the "part." The enactment means that no child shall be allowed to clean any part of the machinery while the "same"—that is, that machinery—is in motion. The magistrates have found that the cleaning in this particular case was not dangerous. That finding, however, is immaterial, because the intention of the Legislature is to prevent children from being allowed to go near the moving parts of any machine, as they must if they clean the fixed parts. I think the case must be remitted to the magistrates with the expression of our opinion that they ought to have convicted.

KAY L.J. I am of the same opinion. The grammatical construction of the section is entirely against the view which the magistrates have taken. The word "same" means the

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machinery and not the part cleaned. When the object of the Legislature is considered, it is inconceivable that the true meaning can be that which the magistrates have thought. A child, employed to clean the part which never moved of a machine which was in motion, would be exposed to as great danger as if he were cleaning the part in motion. It is no answer to say that the child in this case was in no danger. The statute means that, when all the parts of a machine which do move are moving, then no child shall be allowed to clean any part of that machine. Any other construction would point the way to the very danger which the Legislature intended to prevent.

Judgment for appellant.

Solicitor: *The Solicitor of the Treasury.*

W. A.

C. A.

1896

Feb. 5.

[IN THE COURT OF APPEAL.]

CUBISON *v.* MAYO.

County Court—Practice—Costs—Taxation—Remitted Action—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 118.

The provision of s. 118 of the County Courts Act, 1888, which prevents the recovery by a solicitor from his client of costs incurred in a county court, unless they have been allowed on taxation, only relates to cases in which there is an application for taxation. Therefore the solicitor may recover such costs without taxation, where there has been no application for it, and the client is no longer entitled to taxation.

By Lord Esher M.R. and Lopes L.J.: Where an action in the High Court has been remitted to the county court, the above-mentioned provision of the County Courts Act, 1888, does not affect a solicitor's right to recover the costs incurred in the High Court before the order remitting the action.

APPEAL by the defendant from the judgment of Day J. at the trial of the action before him without a jury, and cross-appeal by the plaintiff.

The action was by a solicitor for the amount of a bill of costs delivered in 1889 in respect of work done and disbursements made by him as solicitor for the defendant in an action of contract against her, which was originally commenced in the High

Court, but was ordered to be tried in the county court under s. 65 of the County Courts Act, 1888, and tried accordingly. Part of the bill related to the costs incurred in the High Court before the order for trial of the action in the county court, the remainder to the costs subsequently incurred in the county court. The bill of costs had not been taxed, no application having been made by either party for taxation. The learned judge gave judgment for the plaintiff for the amount of the costs incurred in the High Court, but held that s. 118 of the County Courts Act, 1888, made taxation a condition precedent to the right to recover the costs subsequently incurred in the county court; and therefore the plaintiff could not maintain his claim for them. (1)

Moresby, for the defendant. Taxation was a condition precedent to the plaintiff's right to recover any portion of the bill. When an action is ordered to be tried in the county court under s. 65 of the County Courts Act, 1888, it is provided by the section that the action and all proceedings therein shall be tried and taken in such court as if the action had been originally commenced therein. The decisions shew that, as soon as an action is transferred from the High Court to the county court under that section or s. 66, the jurisdiction of the High Court over it is at an end, and it must be treated as an ordinary county court action: see *Harris* v. *Judge* (2); *Duke* v. *Davis*. (3)

(1) The County Courts Act, 1888, s. 118, provides that "All costs and charges between party and party shall be taxed by the registrar of the court in which such costs and charges were incurred; but his taxation may be reviewed by the judge on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force. All costs and charges between solicitor and client shall, on the application either of the solicitor or client, but not otherwise, be taxed by the registrar of the court in which such costs and charges were incurred, but his taxation may be reviewed by the judge on the application of either party, and no costs or charges shall be allowed on such taxation which are not sanctioned by the scale then in force, unless the registrar shall be satisfied that the client has agreed in writing to pay them, in which case they may be allowed; and no solicitor shall have a right to recover from his client any such costs or charges unless they shall have been allowed on taxation."

(2) [1892] 2 Q. B. 565.

(3) [1893] 2 Q. B. 107, 260.

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Boydell v. *Millar* (1) is overruled by those cases. Therefore, the costs incurred in the High Court before the transfer of the action to the county court must be treated as costs incurred in the county court within the meaning of s. 118 of the County Courts Act, 1888. By that section taxation is made a condition precedent to a solicitor's right to recover costs incurred in the county court. By ss. 65 and 66, the costs incurred in the High Court previously to the order remitting the action are no doubt to be allowed according to the High Court scale; but the meaning is that they are to be taxed on that scale by the registrar of the county court. [He also cited *Bowles* v. *Drake & Co.* (2)]

H. Dobb, for the plaintiff. The provision of s. 65 upon which the defendant relies only applies to subsequent proceedings in the remitted action. It does not provide that for all purposes the action is to be treated as if originally commenced in the county court. The cases cited for the defendant only shew that the jurisdiction of the High Court over the proceedings in that action is at an end when the action is remitted. There is nothing to take away the right of the plaintiff to recover the costs incurred in the High Court by an action in the High Court in the usual way. Sect. 118 only applies to costs incurred in the county court. No subsequent case has overruled *Boydell* v. *Millar*. (1) It was held in that case that s. 118 did not apply to the costs incurred in the High Court before an action was remitted to the county court. Therefore the learned judge was right in holding that the plaintiff was entitled to recover the costs in the High Court. But the plaintiff was entitled to recover the whole of the costs for which the action was brought. Sect. 118 only provides for taxation of costs as between solicitor and client if taxation is applied for by either party. If there is no application for taxation, the provision that "no solicitor shall have a right to recover from his client any such costs or charges unless they shall have been allowed on taxation," does not apply. Here the time for taxation according to the general law on the subject had long expired.

(1) 60 L. J. (Q.B.) 251. (2) 8 Q. B. D. 325.

It is contended that the words in the last clause of the section, "any such costs or charges," only refer to the costs or charges mentioned immediately before, namely, costs or charges not sanctioned by the scale. [He also cited *White* v. *Cohen*. (1)]

Moresby, in reply.

LORD ESHER M.R. In this case an action of contract was brought against the defendant in the High Court, and the present plaintiff acted in that litigation as her solicitor. That action was remitted to the county court for trial and there tried, the plaintiff continuing to act therein as the defendant's solicitor. The plaintiff's bill of costs was delivered more than a year before this action was brought, and the defendant did not within a year from its delivery apply for taxation of it. After the expiration of a year the right of the defendant to taxation was lost in the absence of any special circumstances in respect of which there might be still a right to apply for an order for taxation. No application for taxation was ever made by the defendant either before or at the trial, and there is no suggestion of the existence of any special circumstances in the case. The learned judge decided that the plaintiff was entitled to recover the amount claimed for the work done and disbursements made by him while the action was in the High Court without taxation, but that the amount claimed for work done and disbursements made in the action after it had been remitted to the county court could not be recovered, because there had been no taxation. With regard to the costs incurred before the action was remitted to the county court, the case of *Boydell* v. *Millar* (2) is a distinct authority for the proposition that in a case like this such costs may be recovered in an action in the High Court. The cases which the defendant's counsel cited do not appear to me to overrule that case, which I think was rightly decided. The provisions of ss. 65 and 66 of the County Courts Act, 1888, which have been relied upon for the defendant, apply only to the subsequent proceedings in the remitted action, and not to another action commenced in the High Court and which is within the jurisdiction of that Court. The appeal of

(1) [1893] 1 Q. B. 580. (2) 60 L. J. (Q.B.) 251.

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the defendant therefore fails. Upon the cross-appeal I am of opinion that the plaintiff is entitled to succeed. The plaintiff was according to the general law on the subject entitled to maintain his action in the High Court for all the costs due to him for acting as the defendant's solicitor in the action, both in the High Court and afterwards in the county court; but the defendant's counsel relied upon the provisions of s. 118 of the County Courts Act, 1888, and contended that that section made taxation a condition precedent to the plaintiff's right to recover his costs. The true construction of that section appears to me to be that the provisions contained in it with regard to taxation of costs as between solicitor and client only apply where there is an application for taxation, and therefore the last provision in the section, which enacts that "no solicitor shall have a right to recover from his client any such costs or charges unless they shall have been allowed on taxation," does not apply where there is no application for taxation. It is unnecessary on the present occasion to determine whether or not that provision applies, as has been contended, only to costs and charges which are not sanctioned by the scale. My view is that it does not apply where there has been no taxation, none having been asked for, and the time for taxation has gone by. Here no taxation was ever applied for, and the time for such an application has long expired. The plaintiff therefore has a clear right to maintain his action in the High Court for the whole of his bill of costs incurred in conducting this litigation for the defendant. For these reasons, I think the appeal of the defendant must be dismissed and the cross-appeal of the plaintiff allowed.

LOPES L.J. I am of the same opinion. With regard to the question raised by the defendant's appeal, namely, whether the judge was right in giving the plaintiff judgment for the costs incurred in the High Court before the action was remitted to the county court, I propose only to say that I think the decision in *Boydell* v. *Millar* (1) is conclusive that the plaintiff could maintain his action for those costs. It was contended that subsequent cases had overruled that decision; but that does

(1) 60 L. J. (Q.B.) 251.

not appear to me to be so, and in my opinion it was correct. Upon the cross-appeal the plaintiff claimed to be entitled not only to the costs for which judgment had been given in his favour, but also to the costs incurred after the action was remitted to the county court. It was argued for the defendant that the plaintiff was prevented from recovering these costs by s. 118 of the County Courts Act, 1888. In this case the bill of costs sued for was delivered several years before action, and no application was ever made to tax it, either on the ground of special circumstances or otherwise. In my opinion, the true construction of the provisions of s. 118 with regard to costs as between solicitor and client is that they do not apply unless there has been an application for taxation. That being so, I do not think the section assists the defendant. The result is that the plaintiff is entitled to recover the whole of the bill of costs for which he sues.

RIGBY L.J. I am of the same opinion. The first point raised is whether the costs incurred in the High Court before the action was remitted to the county court are to be considered as costs incurred in the county court. Without expressing any very definite opinion on the point, I should be disposed to say that they are not. But the more important point on which the whole case depends is with regard to the construction of s. 118. The defendant's counsel endeavoured to construe that section as a positive enactment that no solicitor should in any case recover from his client costs which would otherwise be due to him in respect of a county court action or an action remitted to the county court, unless there had been a taxation and the amount to be recovered had been ascertained by that taxation. I find in the first part of the section a positive direction that costs as between party and party shall be taxed, but in respect of costs as between solicitor and client taxation is expressly made optional. It is provided that they are to be taxed on the application either of solicitor or client, but not otherwise. The general law of solicitor and client with regard to the right of the former to recover costs is to this effect: the solicitor must deliver a signed bill of costs, and, if the client desires that it should be

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taxed, he must under ordinary circumstances apply for taxation within a year from its delivery; under special circumstances an order for taxation may be obtained after the expiration of the year, but the general rule is that taxation can only be obtained within that time. The question is whether s. 118 intended to abolish that law with regard to costs incurred in the county court. I think the reasonable construction of it is that it provides for taxation of costs as between solicitor and client if it is applied for in accordance with the general rule of law as to the time within which such taxation can be obtained, and does not give an unlimited right to taxation. If that be the true construction of the section, it follows that the provision that no solicitor shall have a right to recover from his client any such costs or charges unless they have been allowed on taxation proceeds on the hypothesis that there has been a request for taxation in due time. It was contended that the section meant that a solicitor should in no case recover unless there had been taxation. I do not think that is the meaning. In this case no taxation was ever required, though several years had elapsed since the delivery of the bill. I do not think that the Legislature meant to provide that in such a case the solicitor should have no right of action for his costs.

Appeal dismissed and cross-appeal allowed.

Solicitor for plaintiff: *A. E. Cubison.*
Solicitor for defendant: *E. Chester.*

E. L.

HANKS *v.* BRIDGMAN.

1896
Feb. 10.

Tramway—By-law—Requirement to Deliver up Ticket or Pay Fare—Reasonableness.

By a by-law made by a tramway company and enforceable by a penalty, "Each passenger shall . . . . when required so to do either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger."

A passenger, having paid the fare and received a ticket, inadvertently lost it, and was thus unable to deliver it up when required. He declined to pay the fare over again, and was summoned by the company for breach of the by-law:—

Held, that the by-law was not unreasonable, and that the passenger ought to have been convicted.

CASE stated by a metropolitan magistrate under the Summary Jurisdiction Acts.

An information was preferred by the appellant against the respondent for that he, being a passenger upon a car belonging to the North Metropolitan Tramways Company, did not deliver up his ticket when requested so to do by a duly authorised servant of the company, or pay the fare legally demandable for the distance travelled.

At the hearing it was proved that the respondent was an outside passenger on a car belonging to the North Metropolitan Tramways Company; that he was asked by an inspector of the company to deliver up his ticket, but that he did not deliver it up, alleging that he had paid his fare and thrown away the ticket; that he was then asked to pay the fare for the distance travelled by him, but that he declined to do so. It was not suggested that the respondent had any intention to defraud the company, and the magistrate found as a fact that he had paid his fare and had received a ticket, and that he had destroyed it through inadvertence, and without any intention to defraud the company.

By the company's by-laws made under the Tramways Act, 1870, and duly allowed by the Board of Trade, "Each passenger shall shew his ticket (if any) when required so to do to

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the conductor or any duly authorised servant of the company, and shall also when required so to do either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger." "Any person offending against or committing any breach of these by-laws and regulations shall be liable to a penalty not exceeding forty shillings."

A copy of the by-laws was exhibited on a panel of the car on which the respondent was riding.

The magistrate dismissed the information on the ground that the default to comply with the requisition to deliver up the ticket must be wilful and not inadvertent, but stated this case for the opinion of the Court.

C. W. Mathews (*C. F. Gill* with him), for the appellant. The magistrate was bound to convict. In declining to pay the fare legally demandable the respondent committed a breach of the by-law. The matter has already been decided, and it has been held that the by-law is a reasonable one, and that where a passenger refuses to deliver up his ticket he has committed a breach of the by-law: *Heap* v. *Day*. (1) It is impossible to distinguish that case from the present one.

The respondent did not appear.

LINDLEY L.J. I think that on consideration one can see the reason of this by-law. The appeal must be allowed. No doubt the by-law is not worded very happily; but it seems to me quite obvious that the fare was legally demandable, and that on the refusal to pay it the passenger became liable to conviction. The facts of the case are very short. A gentleman travelling on the tram-car inadvertently loses his ticket. It is not found that he had no money to pay his fare over again, but when he is asked to do so he refuses. If he was unable to do so—if, for instance, he had had his pocket picked, and had lost both his ticket and his money—I should feel extremely reluctant to say that in such a case he had incurred the penalty. So, too, if he had given up his ticket to one inspector and thus was unable to give it up when it was asked for a second time, I

(1) 51 J. P. 213.

should not be inclined to hold that the by-law had been infringed. But that is not the case here. The ticket had been lost (inadvertently no doubt—there is no suggestion of fraud), and the passenger refuses when requested to pay the fare. In such a case *Heap* v. *Day* (1) does apply, and the magistrate was wrong.

KAY L.J. I agree. The case is really governed by *Heap* v. *Day*. (1) The by-law has the force of an Act of Parliament, and the passenger has wilfully disobeyed it. When he was unable to produce his ticket he ought on demand to have paid the fare, and then, if he could prove that he had paid it twice over, he would have been able to recover it back again. To refuse to pay the fare was an offence against the by-law, for which he became liable to a penalty, and the magistrate ought to have convicted. Of course, I do not say what the penalty should be, but in many instances a very small amount would meet the justice of the case.

Judgment for appellant.

Solicitor for appellants: *Hugh C. Godfray.*

(1) 51 J. P. 213.

A. P. P. K.

1896
Feb. 15.

LOWE *v.* VOLP.

Tramways—By-law—Requirement to Shew Ticket—Reasonableness.

By a by-law made by a tramway company, and enforceable by a penalty, "Each passenger shall shew his ticket (if any) when required so to do to the conductor or any duly authorised servant of the company."

A passenger, having paid the fare and received a ticket, refused to shew it to an inspector of the company, and was summoned for breach of the by-law.

Held, that the by-law was not unreasonable, and that the passenger ought to have been convicted.

CASE stated by a metropolitan magistrate under the Summary Jurisdiction Acts.

An information was preferred by the appellant against the respondent for that he, being a passenger upon a car belonging to the South London Tramways Company, refused to shew his ticket when required so to do by a duly authorised servant of the company contrary to a by-law of the company. At the hearing it was proved that the respondent was a passenger on a car belonging to the company, and that he was asked by an inspector of the company to shew his ticket. The respondent refused to shew his ticket, but gave to the inspector a number which was the number of the ticket which he had received from the conductor. The respondent had duly paid his fare, and in refusing to shew his ticket he had no intention to defraud, and did not in fact defraud, the company. No alternative demand was made by the company's officials for the fare on non-production of the ticket by the respondent. The by-law was in the following terms: "Each passenger shall shew his ticket (if any) when required so to do to the conductor or any duly authorised servant of the company, and shall also when required so to do either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger."

By another by-law, "Any person offending against or committing a breach of any of these by-laws or regulations shall be liable to a penalty not exceeding 40*s*."

The magistrate held that the by-law was unreasonable, and refused to convict the respondent.

Spokes (*Hume Williams* with him), for the appellant. The by-law has already been before the Court, and has been held to be reasonable: *Heap* v. *Day* (1); *Hanks* v. *Bridgman* (2); and Lush J. expressed a similar opinion in *Saunders* v. *South Eastern Ry. Co.* (3) [He was stopped.]

Francis Watt (*Arthur May* with him), for the respondent. The by-law is unreasonable. *Heap* v. *Day* (1) and *Hanks* v. *Bridgman* (2) were decided on the second part of the by-law which relates to the delivery up of the ticket, or in the alternative the payment of the fare. The by-law now under consideration is really separate, and relates solely to the shewing of the ticket. No alternative is given; and therefore if a passenger has lost his ticket he must be convicted of a breach of the by-law, although if he was called upon to deliver up the ticket, and not merely to shew it, he would have the option of paying the fare instead. The company cannot be allowed to impose liabilities on passengers merely for the purpose of exercising a check over their own servants. There must be fraudulent intent to render a passenger liable to conviction. [He cited *Huffam* v. *North Staffordshire Ry. Co.* (4); *Dyson* v. *London and North Western Ry. Co.* (5); *Saunders* v. *South Eastern Ry. Co.* (6); *Bentham* v. *Hoyle.* (7)]

LINDLEY L.J. In this case I think the question is really covered by authority. The magistrate has refused to convict under a by-law which has come before the Courts more than once. The section of the Tramways Companies Act (8) which authorises the making of by-laws is in the following terms: "The promoters of any tramway may from time to time make regulations for regulating the travelling in or upon any carriage belonging to them . . . . And for better enforcing the observance of all or any of such regulations it shall be lawful

(1) 51 J. P. 213.
(2) Ante, p. 253.
(3) 5 Q. B. D. 456, at p. 466.
(4) [1894] 2 Q. B. 821.
(5) 7 Q. B. D. 32.
(6) 5 Q. B. D. 456.
(7) 3 Q. B. D. 289.
(8) 33 & 34 Vict. c. 78, s. 46.

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for . . . . such promoters to make by-laws for all or any of the aforesaid purposes." And by s. 47, "Any such by-law may impose reasonable penalties for offences against the same not exceeding 40*s.* for each offence." Under that power this by-law is made: "Each passenger shall shew his ticket (if any) when required so to do to the conductor or any duly authorised servant of the company, and shall also when required so to do either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger." I agree with the counsel for the respondent that this is really two by-laws—one relating to the production of the ticket, and the other to its delivery by the passenger. The second part of the by-law has been before the Court, and has been held to be valid and reasonable both in *Heap* v. *Day* (1) and by this Court in *Hanks* v. *Bridgman* (2); but I think the first part, as to the production, has not as yet received judicial construction. The strongest argument against it seems to me to be that it may be said that the Legislature did not intend to give power to tramway companies to impose penalties on passengers in order to enable the companies to check the conduct of their own servants. But that is the very argument that was put forward in *Heap* v. *Day* (1), and was there overruled by Lord Coleridge and Lord Bowen. That decision is binding upon us, and it clearly disposes of that point. Then it is said that the by-law is unreasonable, because it does not give a passenger who is unable to produce his ticket the option of paying the fare instead. I think it is quite clear that the words "or pay the fare" in the latter part of the by-law only relate to the words which immediately precede them—"either deliver up his ticket," and that they do not apply to the case of a ticket not being shewn. But I do not think that the hardship that is complained of arises, because to my mind the words "if any" are very important. If the passenger has a ticket he has to shew it, and if he does not do so he is subject to a penalty; but if he has not got a ticket, or if he has lost it, that part of the by-law does not apply. That is the reason I think that the alternative words allowing payment of the fare in lieu of

(1) 51 J. P. 213. (2) Ante, p. 253.

delivering up the ticket are to be found in the second half of the by-law, and not in the first. They are not needed in the first half, because if a passenger has a ticket he must shew it when he is asked to do so; but if he has lost the ticket he cannot be fined for not shewing it. I can see no reason why a person who has a ticket and refuses to shew it should not be subjected to a penalty. Indeed, in the case of *Saunders* v. *South Eastern Ry. Co.* (1), Lush J. expressly says that such a provision is a reasonable one. The cases which have been cited are not in point. In all of them the by-laws under consideration were dealing with subjects precisely the same as those which were dealt with by the enabling Act of Parliament, and the effect of those decisions was to say that there was no power to make by-laws in wider terms than the powers given by those Acts.

I am of opinion that the magistrate was mistaken and that the respondent ought to have been convicted.

KAY L.J. I am of the same opinion. No doubt the part of the by-law now before us was not considered in *Heap* v. *Day* (2); but I think that it is reasonable and valid. Sect. 51 of the Tramways Act provides that if any person avoids or attempts to avoid payment of his fare, or, having paid his fare for a certain distance, knowingly and wilfully proceeds beyond such distance, and does not pay the fare therefor, or attempts to avoid payment thereof, or knowingly and wilfully refuses to quit the carriage on arriving at his destination, such person shall be liable to a penalty. Now, if the company were to make by-laws providing that a person who inadvertently did any of these things should be liable to a penalty, those by-laws would be clearly unreasonable.

That is the effect of the decisions.

But the by-law we are now considering is made under s. 46, and is, as it seems to me, within the powers there given to the company for "regulating the travelling in or upon any carriage belonging to them." I agree with Lindley L.J. that the words "if any" prevent any hardship from occurring: the passenger

(1) 5 Q. B. D. 456, at p. 466. (2) 51 J. P. 213.

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is only compelled to shew a ticket if he has got one. It seems to me that the main purpose of the by-law is to give the company a check over their conductors, that they have power to make by-laws for that purpose, and that this by-law is a reasonable one. I therefore hold that the magistrate was wrong in refusing to convict.

Judgment for appellant.

Solicitors for appellant: *Blyth, Dutton, Hartley & Blyth.*
Solicitor for respondent: *E. R. Oliver.*

A. P. P. K.

1895

Aug. 1, 2, 3, 5, 6, 7, 9; *Oct.* 25.

[BEFORE THE RAILWAY AND CANAL COMMISSION.]

RICKETT, SMITH & CO., LIMITED, AND OTHERS *v.* THE MIDLAND RAILWAY COMPANY.

THE DERBYSHIRE SILKSTONE COAL COMPANY *v.* THE SAME.

THE GRASSMOOR COMPANY, LIMITED *v.* THE SAME.

Railway — Regulation — Increase of Rates — Standard of Reasonableness — Railway and Canal Traffic Act, 1894 (57 & 58 *Vict. c.* 54), *s.* 1, *sub-s.* 1.

By the Railway and Canal Traffic Act, 1894, s. 1, sub-s. 1, "Where a railway company have, ... since the last day of December, 1892, directly or indirectly increased . . . . any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any Provisional Order confirmed by Act of Parliament."

In a case where rates for the carriage of coal had been indirectly increased on January 1, 1893:—

Held, by Collins J., that the effect of the Act was not necessarily in all cases to declare the increased rates void, but that all future increases of rates must be tried by the standard of reasonableness, depending on circumstances existing or apprehended before the increase was made, and therefore, in the case then before the Court, before the Act came into operation.

APPLICATIONS by the three colliery companies above mentioned, alleging that the respondents, the Midland Railway

Company, after the last day of December, 1892, the day named in s. 1, sub-s. 1, of the Railway and Canal Traffic Act, 1894 (57 & 58 Vict. c. 54), which is set out at the beginning of the judgment of Collins J., namely, on January 1, 1893, had indirectly increased their rates or charges for coal and coke carried by the respondents from the collieries of the applicants over the Midland Railway, and complaining that such increase of the rates or charges was unreasonable.

The nature of the increase complained of, and the facts, so far as they are material to the question of law for which the case is reported, appear from the judgment.

1895. August 1, 2, 3, 5, 6, 7, 9. *Finlay, Q.C., Balfour Browne, Q.C.*, and *H. Sutton*, for the applicants, Rickett, Smith & Co.

Pember, Q.C., Balfour Browne, Q.C., and *H. Sutton*, for the applicants, the Grassmoor Company.

Balfour Browne, Q.C., and *H. Sutton*, for the applicants, the Derbyshire Silkstone Coal Company.

C. A. Cripps, Q.C., Ernest Moon, and *W. J. Noble*, for the respondents, the Midland Railway Company.

Cur. adv. vult.

1895. Oct. 25. The following written judgment was delivered by

COLLINS J. The question for decision in these cases arises under s. 1 of the Railway and Canal Traffic Act, 1894, which enacts that "Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any Provisional Order confirmed by Act of Parliament."

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The applicants complain that the respondents since the day named in the Act, namely, on January 1, 1893, have, directly or indirectly, increased their rate for coal carried to London and other stations. They state that whereas up to January 1, 1893, the company's rates for coal and coke carried from collieries on their system were calculated on a basis of 21 cwt. to the ton, their rates since that date have been calculated upon a basis of 20 cwt. to the ton, with an allowance of 2 cwt. per truck for wastage, and they say that this change is equivalent to an addition of about $3\frac{1}{2}d.$ a ton upon the carriage of their coal to London. The respondents do not deny that they have indirectly increased the rate by the new arrangement, but they justify the increase as reasonable, mainly on two alternative grounds. They say that the 21 cwt. carried at the old rate was originally and really an allowance for wastage of coal in transit, and was carried free of charge; that, as a fact, at the time when the rate was raised, very little, if any, coal was actually lost in transit, and the 2 cwt. per truck regarded as a wastage allowance is now amply sufficient, and therefore reasonable—reasonable in itself whether or not the wastage was greater when the rate was originally made in 1877 or not; and secondly, that since the original rate was fixed, namely, in 1877, circumstances have changed; that by modern improvements coal is now carried with less waste in transit, while the expenses of carriage have been greatly increased to the company by a rise in wages, by statutory requirements shortening the hours of labour and imposing additional obligations on the company, and by a rise in the price of locomotive coal; and they produced tables shewing an increase of working expenses of 7·41 per cent. between 1880 and 1892, and claimed that they had thus justified an addition which amounts to between 3 and 4 per cent. only upon the old rate. The applicants, on the other hand, contended that on the true construction of the section the increase was necessarily unreasonable. They submitted that in effect the old rates were virtually made maxima, and that the naming in the Provisional Order of other and higher rates as maxima was merely to leave a margin for future contingencies which might render the old rate no longer fair to the company; that an

increase, therefore, to be justified at all must be justified by something happening after the day named in the Act, which in this case would be impossible, inasmuch as the Act, though passed in 1894, speaks from December 31, 1892, the day before the rate in question came into operation. They denied that the basis of 21 cwt. to the ton had anything whatever to do with an allowance for wastage, and, while strenuously urging that nothing prior to January, 1893, could be considered, they contended that the respondents, even if such considerations were admissible, had shewn no reasonable grounds for raising the rate, but had, in point of fact, raised it because the new scale of rates imposed upon them by the Provisional Order Confirmation Act of August, 1891 (1), had, by reducing their maxima in some cases below the level of their existing rates, cut off à part of their revenue. It was admitted that such reduction had, in the case of short distance coal traffic, deprived the company of a revenue of about 45,000*l.* per annum. It is obvious, therefore, that it is of vital importance to determine what is the true construction of the statute. If the applicants' view of it is correct, there is no question of fact for our decision. The rate, being admittedly raised on the day after the date named in the Act, stands ipso facto condemned. I am clearly of opinion that the section cannot be so interpreted. It seems to me to be plain enough. It is to be recollected that we are construing a retrospective enactment dealing with a rise in rates made two years earlier, as to which all the facts were before Parliament, and had been the subject of a report by a parliamentary committee. How, then, did the Legislature deal with this fact? Did it, as according to the argument of the applicants it must have intended to do, simply declare the additions void as being in excess of the real maxima, namely, the current rates? Certainly not. It does sweep these additions into the ambit of the Act by fixing the day of its coming into operation one day before that on which the new rates had begun to be exacted; but, instead of avoiding them altogether, as it might have done, it enacts that they and all future increases of rates are to be tried by the same standard, that of reasonableness—reasonableness

(1) 54 & 55 Vict. c. ccxix.

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which must necessarily rest on circumstances existing or apprehended before the increase was made, and therefore in their case before the Act came into operation. Otherwise we must suppose that the Legislature, knowing all the facts, adopted the cumbrous process of sending these rates to be tried by a standard to which it by the same enactment made it impossible for them to conform. I think the section in the case of rates raised after the date named simply removes the presumption theretofore existing that rates below the maxima for their class were reasonable, and throws upon the railway company the onus of shewing that the increase is reasonable. By so doing it necessarily creates a presumption that the old rate before the increase was not inadequate—a presumption, however, which may be rebutted, one factor in such rebuttal being that the increased rate is still below the parliamentary maximum, though this is not to be "enough" of itself to rebut the presumption so created. This is my view of the meaning of the section, and I think it is to some extent supported by the observations of Rigby L.J., in the Great Western Railway case (1) cited by Mr. Browne. It follows, therefore, that the respondents are not limited for their justification to circumstances arising after the date named in the Act.

A question, however, to my mind much more difficult, remains —by what standard are we to try the question of reasonableness? The Legislature have left us at large on the matter, except so far as we may be helped by presumptions or their absence. I think it clear, however, that in our capacity as judges we are bound to direct ourselves adequately as to what circumstances we are to take into consideration on the question of reasonableness. We are not a court of conciliation, or a tribunal of honour. We are not made judges of prudence or of generosity. Vast interests have been committed to our keeping, and a jurisdiction of extreme delicacy has been conferred upon us, in virtue of which we are called upon to adjust a dispute as to the reasonableness of charges made by one set of traders to another in connection with the carriage of coals, in enormous

(1) *Mansion House Association on Railway and Canal Traffic for the United Kingdom* v. *Great Western Ry. Co.*, [1895] 2 Q. B. 141, at pp. 146, 147.

quantities, to the centres of consumption. Our decision upon matters of fact is final. There is no appeal. And yet I cannot suppose that Parliament intended to take the management of these great trading concerns out of the hands of the practical men who work them, and to place it in the hands of the Railway Commissioners. It is of the utmost importance, therefore, that we should not travel beyond our proper province in exercising this novel jurisdiction.

The railway companies are trading bodies who in return for a monopoly, or something like it, have been bound to accept certain statutory maxima beyond which their charges must not range. A vast fixed capital has been brought into existence on the faith of the parliamentary contract expressed in these maxima. Parliament has, indeed, asserted the right to revise these maxima in the public interest, and has recently forced a lower scale upon the companies, but within these maxima, except so far as they have been further modified by the section we are now considering, they must be regarded merely as traders entitled, like other traders, to push their business to the best advantage. "Carriers," says an able writer (1), "are not philanthropists." And the Legislature is not, I think, to be considered as having imposed that character upon them. Their rights, then, are to be ascertained in the same way as were those of carriers at common law unfettered by maxima, but who were nevertheless bound to convey at reasonable rates. A main element in such determination must be the expense to the carrier. "The charge," says Parke B., in a case to which a maximum was inapplicable—*Pickford* v. *Grand Junction Ry. Co.* (2)—"is no doubt to be varied according to the trouble, expense, and responsibility attending the receipt, carriage, and delivery of the different articles." The affluence or indigence of the person rendering or receiving the service is beside the question. The reasonableness of the charge must be measured by reference "to the service rendered and the benefit received"—*Canada Southern Ry. Co.* v. *International Bridge Co.* (3)—which

(1) Balfour Browne on Carriers, p. 76.

(2) 10 M. & W. 399, at pp. 422, 423.

(3) 8 App. Cas. 723, at pp. 731, 732.

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is unaffected by the prosperity or misfortune of the parties to the contract. "It certainly appears to their Lordships" (says Lord Selborne, in delivering the opinion of the Privy Council in that case), "that the principle must be when reasonableness comes in question, not what profit it may be reasonable for a company to make, but what it is reasonable to charge to the person who is charged. . . . It would be a very extraordinary thing indeed, unless the Legislature had expressly said so, to hold that the persons using the bridge could claim a right to take the whole accounts of the company, to dissect their capital account, and to dissect their income account, to allow this item and disallow that, and after manipulating the accounts in their own way to ask a Court to say that the persons who have projected such an undertaking as this, who have encountered all the original risks of executing it, who are still subject to the risks which from natural and other causes every such undertaking is subject to, . . . are to be regarded as making unreasonable charges, not because it is otherwise than fair for the railway company using the bridge to pay those charges, but because the Bridge Company gets a dividend which is alleged to amount at the utmost to 15 per cent.—their Lordships can hardly characterise that argument as anything less than preposterous."

I think, therefore, that the reasonableness of the rate is not to be tried by its effect upon the trade of the persons who have to pay it. It may be a prudent thing for a carrier to tempt traffic by charging rates much lower than he would reasonably be justified in demanding, having regard to the elements which I have referred to as primarily affecting the reasonableness of the rate; but this is a question of railway management, which, in my judgment, lies outside our province. Within these limits he is entitled to get as much as he can, even though he thereby diverts a large part of the merchants' profits into his own pocket. He has, it is true, the strongest possible motive for keeping the rates down to a point low enough to allow the traffic to pass, otherwise he must lose it altogether; and I think railway managers are thoroughly alive to this fact.

Applying, then, these principles to the present case, I find that a rate has been indirectly raised since December 31, 1892,

to the extent of about 3½ per cent. in the case of the particular traffic we are now considering, but that the increased rate is still below the revised maximum. This fact is, however, not enough to shew that the increase is reasonable, and, on the other hand, there is a presumption that the old rate was high enough. But this presumption may be rebutted; and I think it is rebutted if it be shewn that the expense of performing the service has increased to an equal extent since the rate was fixed, provided always that the rate when so fixed is to be deemed to have been reasonable. I think such a presumption does exist. Clearly, until the recent Act, any rate being below the maximum was presumed to be reasonable (see per Lord Watson, *McCarthy* v. *Great Western Ry. Co.* (1)). It matters not for this case whether such presumption was one that could be rebutted or not, for if it exists, no evidence has been given tending to shew that the rate was unreasonable when imposed. The recent Act does not remove this presumption; it merely adds another, namely, that the rate being presumed when made not to be unreasonably high, it is presumed on January 1, 1893, to have been as high as it reasonably could be. But this last presumption may be rebutted for the reasons I have already given, and if it is rebutted, the first remains. I start, then, from the position that the rate of 1877 was not unreasonably high, and I approach the question of fact whether, having regard to the services rendered and received, and the trouble, expense, and responsibility attending the receipt, carriage, and delivery, there has been since that time a change of circumstances justifying the increase? In my opinion there has been such a change. I think it is not necessary to decide whether the 21 cwt. was originally a wastage allowance or not. There is some evidence both ways, and the origin of the practice is obscure. But whatever its origin it was certainly a benefit to the freighter, and to the extent that it has been withdrawn the rate has been increased. Neither did Mr. Cripps convince me that it could be regarded as a thing apart from the other 20 cwt., so that if it could be looked upon as a wastage allowance it had always been much too large, and might, therefore, be reasonably reduced,

(1) 12 App. Cas. 218, at p. 235.

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without change of circumstances since the time it was first allowed. Wastage or not, it was conveyed with the other 20 cwt. at an entire rate, as to which there was a presumption that it was high enough before it was raised; and this presumption is not rebutted, unless it be shewn that the whole rate, of which the wastage allowance was a part, was lower when it was made than it reasonably might have been, or that circumstances have changed in the interval. Proof that the wastage allowance was too high is no proof that the whole rate was not high enough. I think, however, that to a slight extent the merchant does get more coal now for his freight than he did seventeen years ago through the diminution of waste in transit; and though I incline to the opinion that, as between freighter and carrier, the latter was not held responsible for ordinary wastage in transit, the difference between the waste now and at the time when the old rate was made is so slight that it does not appreciably affect the question before us. The evidence, however, of Mr. Turner and Sir Henry Oakley, and the tables put in by them, satisfy me that there has been a substantial increase in the working expenses in the coal traffic large enough to cover the increase of rate.

Those tables were ably criticised by Mr. Balfour Browne, but no evidence was called by him—probably none could be called—to support his criticisms; and I think they were very satisfactorily answered by Mr. Cripps. Mr. Browne do doubt contended that the tables prepared by the railway company were wholly untrustworthy. He objected, in the first instance, that the proportion of traffic expenses assigned to minerals was conjectural; but the weight of this objection was diminished when it was shewn that the estimate was made only for the purpose of comparing one year with another, and whether accurate or not—and the railway experts declared it was accurate—it did not affect the justice of the comparison—the same proportion being taken in both years. He then suggested that a portion of the expenses, namely, maintenance of way and locomotive power, which had been taken on the basis of train mileage, should have been taken, like the other items, on the basis of their ratio to gross receipts; but as he afterwards contended

that all the expenses should be taken on a train-mileage basis, this objection also fell to the ground. His objections finally resolved themselves into two. He said that a train-mileage basis would be more satisfactory for the purpose of the comparison than the ratio of expenses to receipts in the years compared; but Mr. Cripps shewed that a calculation made on the basis of multiplying the difference in the cost per train mile, according to the Board of Trade figures, between the two years compared, by the number of miles run in the later year, would give a result shewing a sum for working expenses less by 135,000*l.* than the sum actually expended; and I think it clear, therefore, that train mileage is not a safe basis for the comparison. Coming, then, to closer quarters, Mr. Browne impugned the comparison on the ground that the first year, 1880, had been selected because coal was then unusually low, and that this had the effect of making the working expenses appear unduly low in that year, as compared with 1892. But here, again, Mr. Cripps met him on his own ground, and shewed that even if the coal consumed for locomotives in 1880 were taken at the enhanced price of 1892, it would still leave the working expenses for 1892 higher by 6 per cent. of the total receipts than those of 1880. I think, therefore, that Mr. Browne's criticisms failed to displace, or rebut, the inferences suggested by the tables furnished by the railway company. Those tables were furnished with a view to found a comparison between one year and another, the calculation being made on precisely the same basis in each year, and they shew an excess in the working expenses of mineral traffic in 1892 over 1880 of 7·41 of the whole receipts. It is impossible to give an absolute figure for the cost of moving a ton of goods. It must always be a question of the number of tons and the number of journeys; in other words, the expense at which the traffic is carried must be a relative figure, and, being relative, I think that its relation to receipts in two contrasted years may afford a fair comparison, unless there be some disturbing element to upset the calculation. Where the rates, as in this case, have been the same throughout, I can see no reason why the comparison should not be fair. Having no pretension to being an expert in railway

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accounts, I feel bound to deal with the case on the arguments presented by counsel and put to the expert witnesses; and I think, therefore, that the railway company have discharged themselves of the burden cast upon them, and have shewn that the expenses of conveying their coal traffic have increased to an extent much greater than the increase of the rate, and that this increase is attributable to general causes affecting the whole coal traffic and, therefore, that of the applicants. If there be any fallacy in the railway accounts it has not been pointed out, and I am unable to detect it, nor have the applicants given any evidence to shew that their traffic is not affected by such general causes if they exist.

There is evidence that the company had been for many years considering the advisability of raising their rate, but abstained from doing so pending the readjustment of rates under the statute of 1888, and the inquiries that preceded and followed it. I think it very probable that the old rate would have been allowed to stand but for the fact that the company had been deprived of a large revenue through the compulsory imposition upon them in 1891 of a maximum below their then existing rates in respect of a portion of their coal traffic. Though this fact, in my judgment, cannot be relied on as a factor in establishing that the rate now charged to the applicants is reasonable, I think it abundantly justified the respondent company in looking to see how far they could legally recoup themselves by getting a better revenue from their other traffic. They might well afford to carry at the old rates whilst they were in receipt of the revenue of which they have been deprived without losing the right to fall back upon their strict rights when this source of profit had been cut off. I decide the question before me, therefore, entirely irrespective of this fact. I should add that there is no suggestion of inequality of treatment or undue preference before us.

On a mixed question of law and fact I have sought to state thus fully what I regard as the legal principles upon which the facts must be decided, in order that there may be as little difficulty as possible in taking the opinion of a higher Court. (1)

With regard to some of the topics discussed by the applicants,

(1) No appeal was brought.

I have pointed out that I do not regard them as relevant, but I think it is proved in fact that the volume of trade has not been seriously affected by the increase of the rate. Such decrease as appears on the Midland system since 1893 may be accounted for by the introduction of a new competing line. Neither do I think a dividend of from 5 to 6 per cent. earned by the respondents so excessive, having regard to the great capital at risk, as of itself to suggest that they are extorting unreasonable sums from their customers. As to the form in which the addition has been made to the rate, though some exception was taken to it by colliery owners, as giving rise to inconvenience in quoting rates to purchasers, I think this is a small matter, and there is evidence that vast quantities of coal have been carried for many years on other systems at rates framed on the same basis without complaint. Twelve million tons annually, we are told, are so carried on the London and North Western alone, besides great quantities on the Great Western and London and South Western.

Lastly, I think the public are sufficiently protected by the sea competition, which we are told regulates the price of coal to London. It is only as affording greater facilities of distribution that the railway companies can compete at all. The present case resolves itself merely into a struggle between the collieries and their customers on the one hand, and the railway companies on the other, for a share of the margin of profit which can be made by distributing the rail-borne coal to places difficult of access for that which comes by sea. It is of vital importance to the railway company not to drive the trade away, and I think their enlightened self-interest may be trusted to prevent their doing so; and so far as I can form an opinion upon the statistics, they have not done so. Short of this, I see no reason why, subject to the principles I have above stated, they should not get as large a share of the profit as they can.

The grounds on which I form my judgment apply alike to all three cases. No evidence was given of any change of conditions between the date when the rate was raised and the date of the applications. I am of opinion, therefore, that the applications should be dismissed. I need hardly add that, differing,

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as I believe I do, from both my colleagues on the question to what extent the respondents have proved an increase of expenses, I give my opinion with the greatest diffidence.

SIR FREDERICK PEEL and VISCOUNT COBHAM delivered separate written judgments, dealing in detail with the figures and calculations relating to coal traffic, and the rates charged at different times, and came to the conclusion that on the evidence the reasonableness of the increase of rates had not been proved, that under the circumstances an increase in the rates of twopence a ton on the London traffic would be reasonable, and that the applicants were entitled to damages calculated according to the difference between twopence a ton on the London traffic and the actual increase. (1)

COLLINS J. I gather that my colleagues are prepared to hold that an addition of twopence a ton to the London traffic would not have been unreasonable, and though, as I have already said, my own unaided judgment leads me to the conclusion that the railway company have made good their position to the whole extent of the increase, I am willing to accept that figure, and to believe that there is an error in the railway company's method of taking the accounts which I have failed to detect, and I therefore agree that judgment shall be for the applicants and for damages assessed in the manner laid down by Sir Frederick Peel—that would be for the difference as between twopence a ton on the London traffic and the actual increase.

Judgment for the applicants.

Solicitor for applicants, Rickett, Smith & Co., Limited: *Edward F. Turner.*

Solicitors for applicants, the Derbyshire Silkstone Coal Company: *Neish, Howell & Macfarlane.*

Solicitors for applicants, the Grassmoor Company, Limited: *Fishers.*

Solicitors for respondents: *Beale & Co.*

(1) As the case is reported solely for the sake of the interpretation placed by Collins J. on the Railway and Canal Traffic Act, 1894, these judgments are omitted.

P. B. H.

[BEFORE THE RAILWAY AND CANAL COMMISSION.]

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THE MANSION HOUSE ASSOCIATION ON RAILWAY TRAFFIC *v.* THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway — Regulation — Railway Commissioners — Jurisdiction — Cartage Charges—Increase of Rate—Complaint of Unreasonableness—Railway Rates Confirmation Acts, 1891, 1892—*Railway and Canal Traffic Act*, 1894 (57 & 58 *Vict. c.* 54), *s.* 1, *sub-s.* 1.

Where a railway company have, since the last day of December, 1892, increased a rate or charge for cartage, and complaint is made that the rate or charge is unreasonable, exclusive jurisdiction is not vested in an arbitrator appointed by the Board of Trade under the Railway Rates Confirmation Acts, 1891, 1892, but the Railway Commissioners have jurisdiction to hear and determine the complaint.

A COMPLAINT was made by the applicants, the Mansion House Association, under the provisions of the Railway and Canal Traffic Act, 1894 (1), that certain rates for merchandise between London and Northampton had been increased over the corresponding rates of 1892, and that no circumstances existed to justify the increase.

The railway company by their answer raised the defence that the greater part of the rates complained of were rates compounded of railway charge and cartage, and that the increases objected to had been made in the portion of the rate attributable to cartage only.

C. A. Cripps, Q.C., for the respondents, took the objection that the Railway Commissioners had no jurisdiction to determine the question of the reasonableness of cartage charges, but that all differences in respect of such charges should be determined by an arbitrator to be appointed by the Board of Trade under s. 5 of the Railway Rates Confirmation Acts, 1891, 1892. (2) A similar point had been raised in the case of

(1) 57 & 58 Vict. c. 54, s. 1, sub-s. 1, on which the decision turned, is set out in the judgment.

(2) 54 & 55 Vict. c. ccxiv.-ccxxii.; 55 & 56 Vict. c. xxxix.-lxiv.; the London and North Western Railway

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Wildman v. *Midland Ry. Co.* (1), which is referred to and commented on in the judgment.

Balfour Browne, Q.C., Dodd, Q.C., and *R. Whitehead,* for the applicants.

Pope, Q.C., C. A. Cripps, Q.C., and *C. A. Russell,* for the respondents.

COLLINS J. delivered the judgment of the Court (Collins J., Sir Frederick Peel, and Viscount Cobham) :—

My mind has vacillated a good deal during the argument upon this point, which is, undoubtedly, one of very considerable importance. It arises in this way. The railway company, in answer to a charge that they have, since a date named in the statute of 1894, raised their rate or charge, say that when the rate impugned is dissected, it will turn out that they have not raised any rate as to which we have jurisdiction to entertain the question under s. 1 of the Act of 1894. They say that on the rate being disintegrated it will turn out that that part of the rate which was for conveyance has remained unchanged, and that the apparent increase is due not to an increase in the charge for conveyance, but exclusively to an increase in the charge for cartage. Having said that, they refer to s. 5 of the schedule of the Confirmation Act, 1891, and contend that the effect of that section is to take all questions of the reasonableness of charges for all the matters mentioned in that section—one of which is the collection or delivery of merchandise outside the terminal station—out of the jurisdiction of the Commissioners, and to send them compulsorily to arbitration by an arbitrator to be appointed by the Board of Trade. They say, therefore, that, inasmuch as on their view of the facts, namely, that the increase

Company (Rates and Charges) Order Confirmation Act, 1891, is 54 & 55 Vict. c. ccxxi.

By s. 5 of the schedule of maximum rates and charges, "The company may charge for the services hereunder mentioned, or any of them, when rendered to a trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. . . . . (ii.) The collection or delivery of merchandise outside the terminal station."

The same clause is contained in the other Acts.

(1) Not reported.

is one of the cartage rate only, that raises a difference as to the reasonableness of the cartage charge, that is a difference which, by the terms of the 5th section of the schedule, which I have just referred to, must be decided by an arbitrator appointed by the Board of Trade, and can be decided by no other person, and therefore is a matter as to which the Railway Commissioners have no jurisdiction. They also refer to a case which came before this Court at the last sittings—namely, *Wildman's Case* (1), which, to a considerable extent, is on all fours with the present case, though not entirely, for reasons which I shall point out in a moment.

In *Wildman's Case* (1) this Court did take the course of sending to the Board of Trade an application based upon a complaint under sub-s. 4 of s. 5 of the Confirmation Order Act, 1891. It was a claim in respect of a sum charged for the accommodation of trucks during a certain time, and it was suggested, though it was not admitted, nor was it at all clear on the facts, that there had been an increase made by the railway company in such charge. But the point was taken before us that assuming that what the railway company had done, which primâ facie was a reduction of the charge, in its result did involve an increase in that charge, the Legislature had clearly thought that the convenient mode of deciding such dispute was by arbitration under the 5th section, to which I have referred. We were told that the difference between the parties in that case was one of 8*s*. 6*d*., and we took the view, or, I should say, I took the view, that s. 5 having obviously treated cases of that class as best disposed of by the tribunal therein named, namely, an arbitrator appointed by the Board of Trade, clearly it would be better that Mr. Wildman's case should be decided by that tribunal rather than by ourselves. The case was not fully argued when it was before us, because Mr. Wildman was not represented by counsel; and I am not clear now whether in his case, if all the facts were known, the proper tribunal to have decided it would not have been that to which it was sent, namely, arbitration under the Board of Trade. At all events, it certainly seemed the more convenient tribunal to deal with the matter.

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However, I do not consider myself bound by the decision in *Wildman's Case* (1), because it was decided without full argument, and without the assistance which the Court always derives from able counsel, on the part of Mr. Wildman. Therefore I approach the question as if that case had not come before us at all.

Now, the first section of the Act of 1894 is exceedingly wide in its terms. It says this: "Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, 1892, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then, if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any Provisional Order confirmed by Act of Parliament."

Now, it seems to me that primâ facie the words of that section are abundantly large to cover the case in question. Assuming that the increase in this case has been one of the cartage charge only, there is nevertheless an increase of a charge, and that has been made since the date named in the Act. It has been suggested by Mr. Cripps that the concluding words of the part of the section which I have read—namely, "For that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament"—limit the operation of the section to those cases only where Parliament has fixed a limit or maximum, that the particular charge which we are dealing with is one for which Parliament has fixed no limit, and that therefore on that short ground it is outside the section. Now, I adhere to the opinion—or rather, perhaps, I should say, to the suggestion—which I made in argument in *Wildman's Case* (1), that the provision that a maximum, if it exists, shall not be an answer to a charge of increase where the increase is below the maximum, does not in the least shew that the remedy in the earlier part of the section is meant to be co-extensive only with that possible case. It

(1) Not reported.

seems to me that it may embrace a great many cases besides the cases where there may be a maximum, and the increase may be within it. If there does happen to be a maximum fixed by Parliament with respect to the particular charge, then it becomes a material factor in the discussion whether or not the increase is within that maximum; but where there exists no maximum, that particular factor does not exist in the discussion whether or not the increase is reasonable. That is all. Therefore I think that that argument suggested by Mr. Cripps does not of itself narrow the section to cases only where a maximum has been laid down by Act of Parliament. Therefore, primâ facie, the section is capable of applying to the particular point raised in the case now before us—namely, an increase of the cartage charge.

That obliges us still to consider the point raised by Mr. Cripps, that the effect of s. 5 of the schedule to the Act of 1891 is to deal specifically with the particular case that now arises, namely, the case of a dispute on the part of the applicant and the railway company as to whether or not the charge in respect of cartage is or is not reasonable. The question is whether the specific provision for the determination of that class of dispute by arbitration takes it from the Railway Commissioners, or is such a clear expression of opinion on the part of the Legislature that that particular class of dispute is to be dealt with only in that way, as to force us, in considering the later Act, to hold that the general words of the later Act do not cover the special cases specially dealt with in the earlier Act. Now undoubtedly there is a great deal to be said, and a great deal was very forcibly said by Mr. Cripps, on that aspect of the case; but after consideration, and consideration of many points which were not present to my mind, and which were not referred to in the argument in *Wildman's Case* (1), I have come to the conclusion that that contention must not prevail.

I had better first consider how the law stood at the time when this Act of 1891 was passed, in order to see whether, after the Act of 1891, there was or was not a subsisting jurisdiction in the Railway Commissioners to deal with a dispute as

(1) Not reported.

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to the reasonableness of cartage charges—charges for the collection and delivery of merchandise outside the terminal station. Now there was a provision in the Traffic Act of 1873 (1), namely, in s. 15, which enabled the Commissioners "To hear and determine any question or dispute which may arise with respect to the terminal charges of any railway company, where such charges have not been fixed by any Act of Parliament, and to decide what is a reasonable sum to be paid to any company for loading and unloading, covering collection, delivery, and other services of a like nature." That power was vested in the commissioners by s. 15 of the Act of 1873, and that was the law when this Act, or Order, was confirmed by an Act passed in 1891. Now undoubtedly, in my judgment, that Order did take from the Railway Commissioners a large part of their jurisdiction under s. 15. I do not think that can be disputed. Sect. 15 gave them jurisdiction to consider the reasonableness, and to decide upon it, of the terminal charges and of the sums to be paid "for loading, unloading, covering, collection, delivery, and other services of a like nature." The standard, therefore, fixed by the statute of 1873 was, in cases under that section, a standard of reasonableness to be laid down by the Railway Commissioners; but by the Act of 1891, for a large part of that jurisdiction unquestionably a fixed standard, namely, a maximum, has been laid down by the Legislature; and as to that part of their jurisdiction I do not see how it can be contended that it really remained in the Railway Commissioners. It could not be contended that where Parliament has, by special legislation, fixed a maximum, the Railway Commissioners are nevertheless at liberty to determine what is a reasonable sum. Therefore, I think it must be assumed that, at all events as to a large part of that section, the provisions of the Act of 1891 substituted something inconsistent with the continuance of the Commissioners' jurisdiction under the earlier Act. But they deal in the Act of 1891, not only with that part of the 15th section in respect of which they fixed maxima, but with the residue of it under s. 5; as to a portion of the matters within their jurisdiction they fixed

(1) The Regulation of Railways Act, 1873 (36 & 37 Vict. c. 48).

maxima which ipso facto exclude from the consideration of the Railway Commissioners all questions as to whether or not the sum charged was reasonable, as to the residue—at all events as to that part of it which comes under discussion now—they did not fix a maximum, but they substituted another tribunal, which was to ascertain the reasonableness, for the Railway Commissioners, and though it is not necessary to decide that point on this particular application, because this application was not based upon s. 15 of the Act of 1873, still, as the point has been discussed, I must say that in my own judgment it seems to me that after the Act of 1891 was passed, and before the Act of 1894 was passed, the jurisdiction to deal with the question of reasonableness of terminal charges or the charges named in the 15th section, was taken away from the Railway Commissioners and dealt with by the schedule of the Order to which I have referred—dealt with in part by substituting a maximum for what the Commissioners might consider reasonable, and dealt with as to the other part by substituting arbitration under the Board of Trade for the opinion of the Commissioners.

Now I think that is so, notwithstanding the provision to which our attention was not called in *Wildman's Case* (1), and which I think has an important bearing on the part of the case with which I am about to deal. I think that is so, notwithstanding the 3rd section of the enacting part of the Order of 1891, which is in these terms: "This Order is to be read and construed subject in all respects to the provisions of the Railway and Canal Traffic Acts, 1873 and 1888, and with any other Act or part of an Act incorporated therewith." Giving full effect to that section, and recognising that the paramount legislation is the larger legislation of the Traffic Act, and that the subordinate legislation is the particular legislation whereby the Provisional Order becomes enacted by law; recognising that, I find, on the argument that I have just stated, such an absolute incompatibility between the provisions of the Provisional Order and the enactment of the 15th section of the Act of 1873 that I cannot doubt, notwithstanding the provision that the Order is to be subject to the Traffic Act, that the jurisdiction of s. 15

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was taken away, in all matters material to this case, from the Commissioners and put elsewhere.

However that may be, that brings me to the effect of the Act of 1894 upon the Act of 1891. I find, therefore, when the Act of 1891 became law, that where there was a dispute between a trader and a company as to whether a charge for cartage was reasonable or not the Legislature had directed that that question, being a difference arising under the 5th section, was to be determined by an arbitrator appointed by the Board of Trade, and my view is on that, that after the Act of 1891 became law there was no jurisdiction in the Commissioners to deal with a dispute between a trader and a company as to whether a charge for cartage was reasonable or not.

Now, that being in my view the state of the law, the Act of 1894 was passed in the terms which I have read. Well, are the general provisions of that Act, in the first instance, so inconsistent with the existing provisions of the Act of 1891 as to leave us the alternative of deciding either that the Legislature have in fact repealed the 5th section of the schedule to the Act of 1891, or that they must be taken to have left that intact altogether, and have intended to deal only with cases which could not be brought under the 5th section, which is the contention of Mr. Cripps? He says that the intention of the Legislature in the specific matter of difference, that is, cartage, was that that should be dealt with by one tribunal only, namely, arbitration, and that the Legislature must have passed the subsequent legislation in view of that fact, and therefore cannot be taken to have embraced under the words "rates and charges" such rates and charges as are the subject-matter of difference and of decision under the 5th section of the Act of 1891. It seems to me, however, that when we examine by the light of argument, as we are now enabled to do, more critically the two sections, there is no real incompatibility between them. The Act of 1894, as I have pointed out by merely reading the section, deals with one specific occasion of difference, namely, a difference arising by reason of an increase in a rate or charge since the date named. Now it does not appear to me that there is any incompatibility whatever between these two provisions: (1.) that

under the Act of 1891, in ordinary cases of difference between a trader and a railway company as to the reasonableness of a cartage rate, the arbitrator is to be the proper person to deal with it; (2.) that in a case of difference arising under the special circumstances of an increase made since a given date, that is to be dealt with by the Railway Commissioners. I think when you look at the provisions made in the Act that becomes clear. They deal in the Act of 1894 with the case of an increase, and they enact remedial legislation. They enact a provision obviously in favour of the trader, the person complaining, for they say that such an increase, whether within a maximum or not—it may be within a maximum—of itself throws upon the railway company the burden of justifying it; the basis of the legislation of this section is the fact of an increase—an increase in respect of which the person complaining gets this benefit, that he comes with a primâ facie case in his favour on merely proving the increase, and throws upon the railway company the necessity of justifying it.

Now, as I have said, it seems to me it is not at all incompatible with the general provisions applicable to this special differing circumstance of an increase since a given date, to allow the general question of difference, where that special circumstance does not exist, to be dealt with by an arbitrator appointed by the Board of Trade, and to give to the Commissioners a jurisdiction to deal with the dispute where it originates in the fact of an increase, and thereby to give the trader a different and a better remedy in the case of an increase from that which he may have had where the complaint was one of difference not based on the fact of an increase since a given date.

Now that being my view of the section, it is not at all necessary for me to deal with the difficulties suggested by Mr. Cripps as to whether, when you find an absolute incompatibility between a later general enactment and a prior special enactment, you are to deem that the former one is repealed, or to deem that the incompatibility is such that you must narrow the effect of the later Act by taking what has been dealt with by the former Act out of it. I am not, I think, in the view which

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I have taken as to the two enactments, driven to deal with that contention at all, because there does not appear to me that incompatibility between the two which obliges me to resort to this consideration; but I would point out that this is not a case of a later Act, by general words, if construed in their generality, depriving some special class of persons of some special benefit secured to them by an earlier Act, which is one of the governing considerations where you are dealing with the question whether the later provisions of a general Act have or have not overridden the special provisions of an earlier one. In this case the later Act is one enlarging the benefits secured to a particular class under an earlier Act. It is remedial; it is in no sense cutting down; and for the reason I have pointed out I do not think there is any incompatibility at all between the two enactments.

I may point out that there is another circumstance distinguishing this case from *Wildman's Case* (1), and one which I think affords an argument in favour of the view which I have suggested, and that is that in this case the application is brought, not by an individual trader, but by a public body, which is an association of traders. Now the Legislature clearly intended that public bodies should have the right, though not themselves aggrieved, to put in suit claims which it might be difficult for individual traders for many reasons themselves to put forward. Probably it was thought that there were many cases in which the particular grievance of the particular trader was such that he would rather acquiesce in it than be at the expense and annoyance of trying to have it set right by the tribunal; and therefore the Legislature in its wisdom, by a provision in the Act of 1888, enacted that certain public bodies should have the right to come before the Railway Commissioners, and that the Railway Commissioners should have jurisdiction to determine such questions, and that they might do so without proof that such authority was aggrieved by the matter complained of. It seems to me that it would cut down the remedial purpose of that legislation very largely if we were to take out of it all cases of disputes arising under the 5th section

(1) Not reported.

of the schedule of the Act of 1891. It is obvious that a public body could not bring itself within the provisions of that section. The section itself, as was clearly pointed out by Mr. Balfour Browne, deals with a specific grievance of a specific trader, and it could not be made applicable, I think, to a general application by persons not themselves aggrieved, but who are merely putting in suit the grievances of a number of different traders. Now I think it is fair to suppose that the Legislature in 1894 had in view the earlier legislation, and recognised the advantage to the community of public bodies having the right of putting in suit the grievances of traders, and holding, as I do, that the Railway Commissioners have jurisdiction in this matter, I am enabling a public body to come forward in a case such as this and bring before the Railway Commissioners a grievance which, were Mr. Cripps's view to prevail, it would be impossible for them to put in suit. That is another reason why I think the construction which I have put upon this section is the true one.

For these reasons I think the point made by Mr. Cripps cannot be sustained.

Objection overruled (1)

Solicitors for applicants: *Neish, Howell & Macfarlane.*

Solicitor for respondents: *C. H. Mason.*

(1) The Commissioners then proceeded to hear the case on the question of the reasonableness of the increase of the charges, and at the conclusion of the argument took time for consideration. On February 18, 1896, judgment was delivered granting the application in part.

P. B. H.

1896
Feb. 10.

COOK *v.* WHITE.

Adulteration—Limit of Time for taking Proceedings—False Warranty—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 27—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *s.* 10.

A summons under s. 27 of the Sale of Food and Drugs Act, 1875, against the original vendor of a perishable article of food for giving a false warranty in writing in respect of it to a purchaser, need not be served within twenty-eight days from the purchase of the food for test purposes from that purchaser.

CASE stated by a metropolitan police magistrate under the Summary Jurisdiction Acts.

On May 10, 1895, a summons was issued against M. A. Brown & Son under s. 6 of the Sale of Food and Drugs Act, 1875, charging them with having on April 28, 1895, sold, to the prejudice of the purchaser, a certain article of food, to wit milk, which was not of the nature, substance, and quality of the article demanded by the purchaser. M. A. Brown & Son proved to the satisfaction of the Court that they bought the milk in the same state as sold, and with a written warranty from the respondent, and they were accordingly discharged from the prosecution on May 24. On the same day a summons was issued against the respondent under s. 27 of the Sale of Food and Drugs Act, 1875, for giving a false warranty in writing on April 27, 1895, to M. A. Brown & Son in respect of a churn of milk sold by the respondent to them. This summons was served on the respondent on May 28, which was more than twenty-eight days from the purchase of the milk for test purposes from M. A. Brown & Son. The magistrate held that s. 10 of the Sale of Food and Drugs Act, 1879 (1), had not been

(1) By s. 10 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), "In all prosecutions under the principal Act . . . . the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug for the sale of which in contravention to the terms of the principal Act the seller is rendered liable to prosecution."

complied with, and dismissed the summons, but stated this case for the opinion of the Court.

Macmorran, Q.C., for the appellant. The magistrate was wrong. The words "from such person" shew clearly that the provision as to twenty-eight days only applies where the person is prosecuted from whom the purchase for test purposes was made. It is not intended to apply to prosecutions under s. 27 of the Sale of Food and Drugs Act, 1875, for giving a false warranty.

The respondent did not appear.

LINDLEY L.J. I think in this case that the learned magistrate has misconstrued the section. The case turns on the proper construction of s. 10 of the Sale of Food and Drugs Act, 1879. It is only necessary to read that section carefully in order to arrive at its proper meaning: "In all prosecutions under the principal Act . . . . the summons to appear before the magistrates shall be served upon the person charged with violating the provisions of the said Act within a reasonable time, and in the case of a perishable article not exceeding twenty-eight days from the time of the purchase from such person for test purposes of the food or drug for the sale of which in contravention to the terms of the principal Act the seller is rendered liable to prosecution." It seems to me clear that the period from which the twenty-eight days begins to run in the case of a perishable article is the day of the sale of the article for test purposes, and that such period does not run from the date of the original sale of the article with a warranty of its genuineness. Proceedings against the warrantor, as it seems to me, fall within the first part of the section, and must be taken within a reasonable time. There was no sale by the warrantor for test purposes at all, and it is difficult to see how the provision as to twenty-eight days could apply in such a case. Of course, if the milk had been bought in the first instance from the original vendor for test purposes, the period of twenty-eight days might and would have run from the time of such sale. But in such a case as this, where the milk was bought first of all with a

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warranty and where subsequently there was a sale for test purposes, and then a summons was issued against the original vendor for giving a false warranty, it would be absurd to require that the summons should be served within twenty-eight days of the original sale. The appeal must, therefore, be allowed.

Kay L.J. I am of the same opinion. A summons was taken out against a person from whom a purchase of milk had been made for test purposes. That summons was taken out within twenty-eight days. The person charged was, however, able to prove that he had bought the milk in question with a written warranty, and accordingly that summons failed, and a fresh summons was issued against the original vendor under s. 27 of the Sale of Food and Drugs Act, 1875, for giving a false warranty. That second summons was not served within twenty-eight days from the date of the sale of the milk for test purposes, and the learned magistrate dismissed the summons on the ground that it had not been served in time. I cannot agree with him. Such a reading of s. 10 of the Act of 1879 would seem to involve an absurdity, because the original vendor might have sold, if not milk, some article not perishable in twenty-eight days, more than twenty-eight days before the second sale, or might have given a warranty in advance for all goods sold by him, and such a construction would make it impossible to proceed against the original warrantor. If a person has himself violated the Act in respect of some perishable article the summons against him must be taken out within twenty-eight days; but if he is able to shew that he bought the article with a warranty of its genuineness, it is then sufficient if proceedings are taken against the warrantor within a reasonable time.

I agree, therefore, that this appeal must succeed, and the case be remitted to the magistrate with this expression of our opinion.

Judgment for appellant.

Solicitor for appellant: *Stanley Hoare.*

A. P. P. K.

Followed. PRESTON *v.* FENNELL. [1950] 1 All E.R. 1099.

Applied. PRESTON *v.* FENNELL [1951] 1 K. B. 16

HEWITT *v.* TAYLOR.

1896 *Feb.* 10

Adulteration—Evidence—Certificate of Analyst—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 21.

At the hearing of an information under the Sale of Food and Drugs Act, 1875, the production of the certificate of the analyst is not conclusive evidence if the defendant tenders himself as a witness and gives evidence on his own behalf.

CASE stated by justices under the Summary Jurisdiction Acts.

An information was preferred by the appellant against the respondent under s. 6 of the Sale of Food and Drugs Act, 1875, charging him with selling to the appellant milk which was not of the nature, substance, and quality demanded by the appellant.

At the hearing, a certificate of the public analyst for the county (who had analyzed the milk in question) was produced, which, after stating the constituent parts of the milk, went on to say, "I am of opinion that upwards of six parts of water have been added to every hundred parts of the poorest milk."

The respondent pleaded not guilty, but did not require that the analyst should be called as a witness, nor did he request that the milk should be sent for analysis to the chemical officers of the Inland Revenue Department. He, however, tendered himself as a witness, and gave evidence to shew that he had milked the cows himself, and put the milk into the cans, that there was no water then in the cans, and that he had added no water afterwards, and that no person but himself had had control of the cans from the time the milk was put therein to the time of the sale to the appellant.

The appellant contended that, under the circumstances, the certificate of the analyst was conclusive; but the justices, considering the whole of the facts before them, dismissed the information. (1)

(1) By the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 21, "At the hearing of the information . . . . the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless

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G. W. Clay, for the appellant. The justices were bound to convict. The certificate of the analyst is conclusive, unless the defendant either requires the analyst to be called as a witness under s. 21, or requests that samples of the incriminated food should be sent to the chemical officers of the Inland Revenue Department under s. 22. Those are the only methods of contradicting the analyst's certificate: *Harrison* v. *Richards*. (1)

F. G. Newbolt, for the respondent, was not called upon to argue.

LINDLEY L.J. The point in this case seems to me a simple one, and turns on the true construction of s. 21 of the Sale of Food and Drugs Act, 1875.

The respondent was summoned by the appellant for selling milk which was alleged to be adulterated, and in support of the charge a certificate from the public analyst was produced which was to the effect that upwards of six parts of water had been added to every hundred parts of the poorest milk. The respondent appeared, and although he did not require that the analyst should be called as a witness, he gave evidence himself on his own behalf, which was to the effect that no water had been added to the milk. The justices were satisfied with his evidence, and refused to convict him. It is now contended that they were bound to do so, and it is said that if the analyst is not called as a witness, and if proceedings are not taken under s. 22 for a further analysis of the food or drugs in question, the certificate of the analyst is conclusive, and no evidence given by the respondent can save him from conviction. The section, no doubt, says that the certificate of the analyst shall be

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the defendant shall require that the analyst shall be called as a witness. . . . And the defendant may, if he think fit, tender himself and his wife to be examined on his behalf, and he or she shall, if he so desire, be examined accordingly."

By s. 22, "The justices before whom any complaint may be made . . . . under this Act may, upon the request of either party, in their discretion cause any article of food . . . . to be sent to the Commissioners of Inland Revenue, who shall thereupon direct the chemical officers of their department at Somerset House to make the analysis, and give a certificate to such justices of the result of the analysis."

(1) 45 J. P. 552.

"sufficient" evidence, and, consequently, if no evidence were adduced by the defendant, the justices would be right in convicting upon it without requiring anything further. But that the certificate is not conclusive is clear from the rest of the section. If that part of the section does not mean that the respondent may give evidence to shew that the certificate is wrong, it is absolutely nugatory. The ambiguity in the word "sufficient" is thus removed. It is sufficient only when there is no evidence to the contrary. If, however, there is evidence to the contrary, the justices must weigh that evidence and decide on the whole. In the present case, the analyst could only say, as a fact, that there was an undue proportion of water in the milk. That it had been added to the milk could only be a matter of opinion; and it seems to me that the respondent had the right to contradict it. The appeal must, therefore, be dismissed.

KAY L.J. It is quite clear that if there is evidence on both sides, and the magistrates have to decide upon that evidence, their decision cannot be brought before this Court for reconsideration as a question of law. But it is said that the case here does raise a question of law, because the effect of s. 21 of the Food and Drugs Act, 1875, is that where the certificate of an analyst is given it is conclusive if the analyst is not himself called. I do not find anything of the sort in the section. The certificate is sufficient evidence, and if nothing else appears the magistrates may convict upon it; but it is not conclusive evidence, otherwise the rest of the section would have no meaning. The evidence of the defendant is plainly made admissible to shew that the certificate is inaccurate, and the magistrates had to weigh the evidence and decide the matter, not as a question of law, but as a question of fact. The appeal, therefore, fails.

Appeal dismissed. (1)

Solicitor for appellant: *F. C. Hulton, Preston.*

Solicitors for respondent: *Emmet, Son & Co., for Fletcher, Mossley.*

(1) See ante, p. 284.

A. P. P. K.

1896
Feb. 12.

STRICKLAND *v.* HAYES.

Local Government—County Council—By-law—Reasonableness—Use of Profane or Obscene Language—Annoyance.

A by-law made by a county council under s. 16 of the Local Government Act, 1888, was in the following terms: "No person shall in any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language":—

Held, that the by-law was invalid, since even if the words "or on land adjacent thereto," which were clearly too wide, were struck out, it was still unreasonable, because it did not contain any words importing that the acts must be done so as to cause annoyance.

CASE stated by justices under the Summary Jurisdiction Acts.

The appellant was charged at the city of Worcester with unlawfully using obscene language in a public place, contrary to a by-law made by the Worcestershire County Council, and which was in the following terms: "No person shall in any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language."

The evidence proved that the appellant had used the language complained of on a footpath in a field in the presence of a large number of persons. These facts were not disputed; but the appellant contended that the by-law was unreasonable, and therefore bad.

The justices convicted the appellant, but stated this case for the opinion of the Court.

Crump, Q.C., for the appellant. The justices were wrong. The by-law is bad for unreasonableness. Power to make by-laws is conferred on county councils by s. 16 of the Local Government Act, 1888. That section gives them the same power with regard to counties as borough councils have with regard to boroughs. The county council have no greater power with regard to rural districts than the borough council have as to urban districts. The offence of using profane or obscene language in urban districts is punishable under s. 28 of the

Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), which, however, requires that it shall be proved that annoyance was caused by the language used. A by-law without such a limitation is clearly too wide. The words "or on land adjacent thereto" would include private grounds and even houses, and an offence against the by-law would be committed by a person swearing in his own garden, although no one was annoyed by his so doing. [He cited *Johnson* v. *Mayor of Croydon* (1); *Everett* v. *Grapes*. (2)]

Channell, Q.C. (*Brooke Little* with him), for the respondent. The by-law is good. The word "adjacent" must be construed reasonably, and must mean within hearing. Of course, the language must be used so as to be heard by some one in order to constitute an offence; but it is not necessary that the person using it should be in a public place: *Reg.* v. *Thallman*. (3) Nor is it necessary that it should be proved that the use of the language has caused annoyance. The principle seems to be that if innocent acts are prohibited by by-laws no offence is committed unless it be shewn that the act has caused annoyance; but it is otherwise with acts such as swearing or using obscene language, which must of necessity cause annoyance to the hearers. By 19 Geo. 2, c. 21, which is still in force, profane cursing and swearing is prohibited under penalties, and is spoken of as being "loathsome and offensive to every Christian." Annoyance may, therefore, well be implied from the use of such language, and the by-law cannot be unreasonable merely because it does not require that proof of annoyance to some one should be given. [He cited *Innes* v. *Newman*. (4)]

Crump, Q.C., replied.

LINDLEY L.J. In this case the question raised is whether a certain by-law is valid or invalid. If it is valid, there can be no doubt as to the propriety of this conviction.

The important question is, whether or not this by-law is unreasonable because it goes too far. That is a very formidable objection. I hope it will not be thought that I have any

(1) 16 Q. B. D. 708.
(2) 3 L. T. (N.S.) 669.
(3) 33 L. J. (M.C.) 58.
(4) [1894] 2 Q. B. 292.

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sympathy with persons such as the appellant in this case who use obscene or profane language. It is, however, very important that by-laws should not go beyond the powers of those who make them. Now, s. 16 of the Local Government Act, 1888, under which these by-laws are made, incorporates s. 23 of the Municipal Corporations Act, 1882. Looking at that section, I cannot find that it was intended to give power to make by-laws creating any new criminal offence. Of course, by-laws must do more than merely reiterate the provisions of Acts of Parliament, otherwise they would be nugatory; but it is important to see that they are strictly within the authority under which they were made. I have no hesitation in saying that this by-law goes too far. Whether it is divisible or not I will consider directly; but I have no doubt that a by-law prohibiting the use of such language, not only in any street or public place, but also "on any land adjacent thereto," is too wide, and is far beyond what is necessary for the good government of the county. Such a provision would cover the case of a man swearing in a passion in his own stable-yard, or even, as I think, in his own house, and its enforcement would really be tyranny. I have no doubt whatever that those words are bad. But that being so, is the rest of the by-law bad? There is plenty of authority for saying that if a by-law can be divided, one part may be rejected as bad while the rest may be held to be good. In the present case there is, I think, no difficulty whatever in severing the by-law. If the words "on any land adjacent thereto" are omitted, the rest of the by-law reads quite grammatically. The by-law is, therefore, distinctly severable. But, then, taking the by-law without those words, "No person shall in any street or public place say or recite any profane or obscene song or ballad, or use any profane or obscene language," what are we to say of such a by-law? It strikes one at once that there is nothing in it which requires that the offence should be committed so as to cause annoyance to other people. The Town Police Clauses Act, dealing with precisely the same subject in regard to towns, provides that the offence must be committed "to the annoyance of the residents or passengers." I doubt whether it is competent for the county

council to make a by-law in such wide terms. It would seem that under it a person could be convicted for having sung a bawdy song although there was no person near him who could possibly be annoyed by his having done so. I cannot agree with Mr. Channell's ingenious argument that the use of profane language must necessarily involve annoyance to others, and that it was, therefore, unnecessary to provide that the language should be used so as to cause annoyance. In my opinion the by-law goes far beyond what is reasonable, and we must hold it bad. The county council must take greater care in the language they use in framing their by-laws.

KAY L.J. I have the strongest desire to uphold this conviction and to support this by-law, since it appears that the appellant, on a public footpath and in the presence of a large number of persons, used obscene language. But the danger of upholding the conviction is this. Here is a by-law made under an Act of Parliament which enables county councils to make by-laws for the better government of their counties. If we were to hold it good, we should have similar by-laws made by county councils throughout the country in completely unrestricted words. If the by-law is contrasted with the provisions of Acts of Parliament dealing with similar subject-matter, it is seen at once that words requiring that the act should be done so as to cause annoyance are omitted. In a town where the offence is regulated by the Towns Police Clauses Act, there is no infringement of the regulation unless annoyance is proved. What is the reason that a similar provision should not be imposed in regard to the country? Can it be right that a county council rejecting that restriction should, under an Act of Parliament, make a by-law in these wide terms when they are only empowered to make by-laws for the better government of the county? It would be an infringement of such a by-law if no human being heard the language, and not only if no human being was annoyed by it. If a man were to give himself up and to confess that he had when alone used such language, there would be an infringement of the by-law. It is in much wider terms than any that are usually framed with regard to the

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subject. It would seem, when it is compared with Acts of Parliament, that the omission of words requiring the condition of annoyance was designed, and that it was intended that the by-law should be much wider than such Acts. I should like to support Mr. Channell's very ingenious argument, that annoyance must be implied from the use of such language; but in spite of it the fact remains that in statutes and by-laws relating to the subject words are ordinarily found denoting that the annoyance of others is part of the essence of the offence, and that such words are not to be found here. There is force, too, in the contention of Mr. Crump, that a man has a right to claim that his offence should be clearly stated in the by-law, and that if the annoyance of others is part of the offence that should be stated and not merely implied. It seems to me that this by-law forms such a dangerous precedent that I must say that it is too wide, both on account of the words as to land adjacent to a street or public place, and also because it does not contain words requiring that the acts should be done so as to cause annoyance to others. The conviction, therefore, must be quashed; and I will only express the hope that the by-law may speedily be reframed, and in more careful language.

Conviction quashed.

Solicitor for appellant: *Tree, Worcester.*

Solicitors for respondent: *Clarke & Blundell, for Thornely, Worcester.*

A. P. P. K.

LIDDELL *v.* LOFTHOUSE. (1)

1896
Feb. 13.

Gaming—Betting—Place used for Purposes of Betting—16 & 17 *Vict.* c. 119, *s.* 3.

The respondent was in the habit of going to a certain piece of ground, which was bounded on one side by a hoarding and on two other sides by stays supporting the hoarding, for the purpose of betting with persons resorting thereto:—

Held, that the piece of ground was "a place" within the meaning of 16 & 17 Vict. c. 119, s. 3, and that the respondent ought to have been convicted under that section.

CASE stated by justices under the Summary Jurisdiction Acts.

The respondent Lofthouse was charged at the Stockton-on-Tees Police Court under 16 & 17 Vict. c. 119, s. 3, "for that he, between the 18th and 20th days of June, 1895, then being a person using a certain place situate on the river side in the said borough, and known by the name of the Betting Ground, did unlawfully use the said place for the purpose of betting with persons resorting thereto."

It was proved at the hearing that the place in question was called Hubback's Quay, and was partly surrounded by a hoarding supported by stays driven into the ground. The hoarding was of timber, and was erected by a bill-poster for the purpose of posting bills. On three consecutive days the respondent was found at the back of this hoarding, between the same two stays, calling out the odds on horses, and betting with persons coming to him. The justices found that the evidence clearly shewed that the respondent only went to this particular place for the purpose of making a book on the horse-races, and that he went to this particular place because he knew that there would be a number of people wanting to back horses there. The justices, however, doubted whether this was "a place" within the meaning of the Act, and declined to convict the respondent.

Tindal Atkinson, Q.C., and *Simey*, for the appellant. The justices ought to have convicted the respondent. The piece of

(1) See *Thwaites* v. *Coulthwaite*, [1896] 1 Ch. 496.

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ground between the hoarding and the stays was "a place" within the meaning of 16 & 17 Vict. c. 119, s. 3, which the respondent was using for the purpose of betting with persons resorting thereto.

[They cited *Reg.* v. *Cook* (1); *Haigh* v. *Sheffield* (2); *Eastwood* v. *Miller* (3); *Bows* v. *Fenwick* (4); *Shaw* v. *Morley* (5); *Doggett* v. *Catterns* (6); *Snow* v. *Hill* (7); *Reg.* v. *Preedy* (8); *Gallaway* v. *Maries.* (9)]

Joseph Walton, Q.C. (*C. W. Mathews*, and *Stutfield*, with him), for the respondent. "A place" must be a defined or enclosed space. The evidence shews that the respondent merely moved about an undefined space making bets with people whom he met. That is not an offence within the Act: *Doggett* v. *Catterns* (6); *Whitehurst* v. *Fincher.* (10) The Act was not aimed at the practice of betting but, as appears from the preamble, at the opening and using of places for betting-houses and offices.

The information does not sufficiently describe the place where the offence is alleged to have been committed, and is therefore bad.

Simey, in reply. The decision in *Whitehurst* v. *Fincher* (10) has been explained by Mathew J. in *Hornsby* v. *Raggett.* (11)

LINDLEY L.J. In this case I think that the magistrates ought to have convicted the respondent, and that the offence described in the Act of Parliament was committed by him.

When the facts set out in the special case are taken together, it appears plainly that there was some ground known as Hubback's Quay, on which there was a hoarding supported by stays and posts driven into the ground, thus forming a number of bays between the stays. The bays were not enclosed, but were bounded at the back by the hoarding, and on either side by the stays. To one of those bays the respondent was in the habit of

(1) 13 Q. B. D. 377.
(2) L. R. 10 Q. B. 102.
(3) L. R. 9 Q. B. 440.
(4) L. R. 9 C. P. 339.
(5) L. R. 3 Ex. 137.
(6) 17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765.
(7) 14 Q. B. D. 588.
(8) 17 Cox, C. C. 433.
(9) 8 Q. B. D. 275.
(10) 62 L. T. (N.S.) 433.
(11) [1892] 1 Q. B. 20.

resorting for the purpose of making bets with people there. It is found, as a fact, that the respondent only went to this particular place for the purpose of making a book on the horse-races, and that he went to this particular place because he knew that there would be a number of people wanting to back horses there. It is quite obvious, therefore, that the respondent used this particular bay for the purpose of betting with people resorting to it. It is impossible to deny that. Once having come to that conclusion, there is an end of the case, unless it can be said that this place is so ill defined that it cannot be "a place" within the meaning of the Act of Parliament.

The information is based on s. 3 of 16 & 17 Vict. c. 119, which provides that any person "who, being the owner or occupier of any house, office, room, or other place, or a person using the same," shall use the same for the purposes of betting, shall be liable to a penalty. The purposes for which this bay was used by the respondent were obviously within the Act, and there can be no doubt that if the case was res nova it would be clearly within both the words and the mischief of the Act. But the Act is by no means a new one, and it has frequently received interpretation in the courts, and it is said that those decisions prevent us from holding that this was "a place" within the meaning of the section. Only two of the cases that have been cited to us present any difficulty. The first is *Doggett* v. *Catterns*. (1) When that case comes to be examined, it will be found that it did not turn on s. 3 at all, but on ss. 4 and 5. Those sections deal with persons who are the occupiers of "a place," and the decision of the Court there was that the place in question—a space under a tree in Hyde Park—was not capable of occupation. No doubt some of the judges in that case seem to express a doubt whether that could be "a place" within the meaning of the Act; but, when understood, the case does not present any difficulty. The only other case which is really material is *Whitehurst* v. *Fincher* (2), in which it was held that the bar of a public-house was not "a place" within the meaning

(1) 17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765.
(2) 62 L. T. (N.S.) 433.

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of s. 3. I confess that I felt some difficulty with regard to that case; but our attention has been drawn to what Mathew J., who was one of the judges deciding it, said about it in *Hornsby* v. *Raggett* (1): "It was urged that the decision in *Whitehurst* v. *Fincher* (2) was an authority in favour of the respondent in the present case; but in that case all that was found against the respondent, who was charged with using a room for the purpose of betting, was that three times he went to a public-house and made bets. Under such circumstances, the Court was unable to come to the conclusion that the room was used for the purpose of betting within the Act, for if it had been intended to make all betting in public-houses illegal, the Act would have contained an express provision to that effect." *Snow* v. *Hill* (3) is no authority for the respondent, since in that case the person charged did not use any definite spot, but merely walked about a field, in which racing was taking place, betting with people whom he met.

As has been said, the Act is directed not against betting itself, but against bookmakers and those who make a trade of betting. We are asked whether the respondent in what he did "was using a place for the purpose of betting with persons resorting thereto." I am of opinion that he was, and therefore that he ought to have been convicted.

Then it is said that the place was not sufficiently defined in the information. I do not think that that point is left to us by the case; but if it is, I am of opinion that the place was sufficiently defined for all purposes. As to its being partly undefined, I think that there are many places which, though in some sense undefined, can yet be described with sufficient clearness for the purpose of identification. I have no doubt that this appeal ought to be allowed.

KAY L.J. The short result of the facts stated, and of the inferences to be drawn from those facts, is that the respondent was a professional bookmaker who resorted to a particular place in order to carry on his business as a bookmaker. The place

(1) [1892] 1 Q. B. 20, at p. 23. (2) 62 L. T. (N.S.) 433.
(3) 14 Q. B. D. 588.

seems to me to be sufficiently defined, since it was confined on three sides, and resembled a kind of stall, having the hoarding at the back and the struts or stays on either side of it. On that spot this professional bookmaker on three successive days carried on his business of making bets with the persons resorting thereto. Now, do those facts bring the case within the Act of Parliament? Reading only the material words of s. 3, the offence is committed by a person using a place for the purpose of betting with persons resorting thereto, and this person is therefore clearly within it if there is nothing more. But it is said that the preamble to the Act of Parliament restricts the meaning of the Act, and that the mischief aimed at is the opening of places for betting purposes. But if this bookmaker resorted to this place for the purpose of betting, did he not open it for that purpose? No doubt the Act only intended to interfere with persons carrying on the business of betting, and not with betting itself; but I think that he was doing the very thing at which the Act was aimed.

Then it is said that the former decisions on the Act prevent us from holding that this was "a place" within the meaning of it. I agree with what has been said by my brother Lindley as to them. Neither *Doggett* v. *Catterns* (1) nor *Whitehurst* v. *Fincher* (2) really turned on the meaning of the expression "a place."

But it is contended that the place was not sufficiently defined in the information. I cannot find anything in the Act requiring the place to be defined by metes and bounds. In my opinion, the fact that the expression is not defined in the Act shews that it was intended that justices should have a discretion to say whether the ground in question was "a place" or not. As it seems to me, if a man were to use the ground at the foot of the statue at Charing Cross for the purpose of habitually betting with persons resorting to him there, that, although the space used was entirely undefined, would be "a place" within the meaning of the statute.

In this case there seems to me no doubt that the respondent

(1) 17 C. B. (N.S.) 669; 19 C. B. (N.S.) 765.
(2) 62 L. T. (N.S.) 433.

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was using "a place" within the meaning of the section, and that he ought to have been convicted.

Judgment for appellant.

Solicitors for appellant: *Eldridge & Sprott, for Archer & Parkin, Stockton-on-Tees.*

Solicitors for respondent: *Iliffe, Henley & Co., for Barron & Smith, Darlington*

A. P. P. K.

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Feb. 10.

THE QUEEN *v.* STEWART.

Diseases of Animals Act—Right of Private Person to prefer Information—Diseases of Animals Act, 1894 (57 & 58 *Vict. c.* 57).

A private person may prefer informations under the Diseases of Animals Act, 1894, and the Orders made under that Act, for the right to enforce such Act and Orders is not confined to the local authority.

RULE NISI for a mandamus to the stipendiary magistrate of the borough of Liverpool calling on him to shew cause why he should not hear and determine three informations preferred by one Walter James Burnham against William Paterson for breaches of the provisions of the Animals (Transit and General) Order, 1895 (5305), which was issued by the Board of Agriculture under the powers conferred upon them by s. 22 of the Diseases of Animals Act, 1894.

It appeared that Burnham was secretary of the Liverpool branch of the Royal Society for the Prevention of Cruelty to Animals, and that he preferred the informations against Paterson, who was the master of a steamship carrying cattle, sheep, and swine to the port of Liverpool, for certain offences against the Order which also involved cruelty to the animals carried by him. On the matter coming on to be heard by the stipendiary magistrate, objection was taken that under the Act and Order the only person who could institute proceedings was the borough council, and that Burnham had no locus standi. The magistrate held the objection good, and dismissed the case. Burnham then obtained this rule nisi, which now came on for argument.

Commins shewed cause against the rule. By s. 2 of the Diseases of Animals Act, 1894, "The local authorities in this Act described shall execute and enforce this Act, and every order of the Board of Agriculture so far as the same are to be executed or enforced by local authorities." Then by the 30th clause of the Order in question, under which the proceedings are taken, "The provisions of this Order, except where it is otherwise provided, shall be executed and enforced by the local authority." The local authority in this case is the borough council, as provided by s. 3 of the Act. The effect, therefore, of these provisions is that no one except the borough council can prosecute for offences against the Act and Order: *Reg.* v. *Cubitt* (1); *Reg.* v. *Lovibond.* (2)

Secondly, the proper remedy is not by mandamus. The applicant might have appealed to quarter sessions under s. 55 of the Act, or he might have brought the matter before this Court by means of a special case. The Court will not grant a mandamus where there is another remedy: *Reg.* v. *Smith and Others.* (3)

Bartley (*Colam* with him), in support of the rule. In construing the Act, it is necessary to look at it as a whole. The effect of ss. 2 and 3 is only to provide what the local authorities are to be where it is the duty of local authorities to enforce the Act. Those sections do not exclude any other person from prosecuting, nor do the sections relating to penalties (ss. 51–57). On the contrary, s. 54 provides that offences against the Act may be prosecuted in manner provided by the Summary Jurisdiction Acts; s. 55 gives a right of appeal to "any person" who thinks himself aggrieved by any determination or adjudication of a court of summary jurisdiction under the Act; and s. 57, sub-s. 5, gives half the penalty "to the person who proceeds for the same," thus shewing that it was not the intention of the Legislature that proceedings should only be taken by local authorities.

Reg. v. *Cubitt* (1) was decided on a particular Act which did not contain any such provisions; but, on the other hand,

(1) 22 Q. B. D. 622. (2) 24 L. T. (N.S.) 357.
(3) L. R. 8 Q. B. 146.

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where Acts imposing penalties do contain such provisions, it has been held that proceedings may be taken by any one: *Caswell* v. *Morgan* (1); *Cole* v. *Coulton* (2); *Back* v. *Holmes* (3); *Walker* v. *Laxton*. (4)

LINDLEY L.J. In this case it seems to me that, taking together the Order of the Board of Agriculture of 1895 and the Diseases of Animals Act, 1894, the right conclusion is that there is nothing either in the Act or the Order which is sufficiently plain to deprive any one of his ordinary right to prefer an information. The case of *Reg.* v. *Cubitt* (5) at first seemed very much in point; but when that decision is examined it will be seen that it turns entirely on the provisions of the Sea Fisheries Act, 1883 (46 & 47 Vict. c. 22), which is framed on quite different lines from the Act now under consideration, and which does not contain many of the provisions which are found in this Act. Our judgment must be founded on the consideration of the sections of the Diseases of Animals Act, 1894. Reliance is placed on s. 2: "The local authorities in this Act described shall execute and enforce this Act and every order of the Board of Agriculture so far as the same are to be executed or enforced by local authorities." In terms that section does not apply to preferring informations at all. The local authority are by it constituted the persons whose duty it is to see that the Act is complied with. I do not think that either that section or the words of the 30th clause of the Order of 1895, "The provisions of this Order, except where it is otherwise provided, shall be executed and enforced by the local authority," exclude the ordinary right of any person to prefer an information. But passing on, we come to the sections of the Act which deal with penalties. Reading those sections together, they in fact affirm the right of any person to prefer an information in most significant terms. Is there anything in the Act or the Order which so clearly restricts that right that we ought to say that in this case no one but the borough council had the right to take pro-

(1) 28 L. J. (M.C.) 208.
(2) 29 L. J. (M.C.) 125.
(3) 57 L. J. (M.C.) 37.
(4) 70 L. T. (N.S) 690.
(5) 22 Q. B. D. 622.

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ceedings? I can find nothing of the kind; and we must make this rule for a mandamus absolute.

With regard to the second point raised, namely, that the proper course was not to proceed by mandamus, but either by appeal to quarter sessions or to have come to this Court by means of a special case, it seems clear that this Court has a discretion in the matter; and in this case the method which has been adopted is both the cheapest and the best form of proceeding.

KAY L.J. I am of the same opinion. Primâ facie there is no doubt that anybody may take proceedings to recover a penalty. That is an old rule and is well established. The Act now under consideration in terms provides that penalties shall be imposed for certain acts, and that those penalties shall be regarded as though they were penalties incurred under the Summary Jurisdiction Acts. In order to prevent the application of the general rule, it must be shewn that the Act in plain terms prevents any one, except certain specified persons, from prosecuting for offences under the Act. I can find no such provision. Sect. 2, which has been cited, has nothing to do with the question: it only enacts that where the Act has to be executed or enforced by local authorities, those local authorities shall be the local authorities described in the Act. Reliance is then placed on s. 34, which provides that "where a local authority fail to execute or enforce any of the provisions of this Act, or of an order of the Board of Agriculture, the Board may by order empower a person therein named to execute and enforce those provisions." There is nothing, as it seems to me, in that to indicate that the local authority is the only person who has power to take proceedings for the recovery of penalties under the Act. The really important sections are ss. 51, 52, 54, and 57. Sect. 51 fixes the amount of the penalty, s. 52 prescribes the offences, and s. 54 runs thus: "Any offence against this Act may be prosecuted, and any fine in respect thereof may be recovered, and any money by this Act or an order of the Board of Agriculture made recoverable summarily may be recovered, and any summary orders under this Act or an order

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of the board may be made in manner provided by the Summary Jurisdiction Acts; but nothing in this section shall apply to proceedings under the Custom Acts." There is not a word in that section to indicate that no one except the borough council may take proceedings under the Act. By s. 57, sub-s. 5, provision is made that one-half of every fine and forfeiture recovered under the Act shall be paid to the person who proceeds for the same: thus clearly shewing what the real intention of the Act is. Such a provision is a very common one, and its manifest object is to induce people who become aware of offences against the Act to take proceedings to enforce the Act. There is no provision of the kind in the Act on which *Reg.* v. *Cubitt* (1) was decided, and that makes that decision plainly distinguishable from the present case. But in the four cases which have been cited by Mr. Bartley very similar provisions are to be found in the Acts on which they turned, and I therefore consider them to be in point.

Rule absolute.

Solicitors for applicant: *J. & R. Gole, for Dixon & Syers, Liverpool.*

Solicitor for respondent: *Sydney G. Polhill.*

(1) 22 Q. B. D. 622.

A. P. P. K.

PHILLIPS *v.* EVANS.

1896
Feb. 14.

Revenue—Dog Licence—Certificate of Exemption—Duty of Justices—Offence not of Trifling Nature—Customs and Inland Revenue Act, 1878 (41 & 42 *Vict. c.* 15), *s.* 22—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 16.

The respondent, the owner of a dog, having applied to the Commissioners of Inland Revenue for a certificate of exemption and been refused, declined to take out a licence, and was summoned before justices. The justices held that the commissioners ought to have granted a certificate of exemption, and that if the respondent had committed an offence it was in their opinion of so trifling a nature that they would exercise the powers given to them by s. 16 of the Summary Jurisdiction Act, 1879, and dismiss the information:—

Held, that the justices had no jurisdiction to review the decision of the commissioners as to granting or withholding a certificate of exemption, and that the offence of refusing to take out a dog licence was not an offence of a trifling nature to which s. 16 of the Summary Jurisdiction Act, 1879, would apply.

Case stated by justices under the Summary Jurisdiction Acts.

The appellant, an officer of Inland Revenue, preferred an information against the respondent for keeping a dog without a licence. It was proved at the hearing that the respondent kept a dog, and that he had not an excise licence to keep a dog, nor a certificate of exemption under 41 & 42 Vict. c. 15, s. 22. It was also proved that the respondent had made an application in due form under the section to obtain such a certificate of exemption, but that the Commissioners of Inland Revenue had refused to grant such a certificate to him on the ground that in their judgment he was not entitled to it.

Evidence was tendered on behalf of the respondent to shew that he was a person entitled under s. 22 to receive a certificate of exemption. The appellant objected to such evidence being received; but the justices overruled the objection and heard the evidence. They found as follows:—

1. "That the respondent did keep a dog, as alleged in the information, and that he had neither a licence nor a certificate of exemption.

2. "That the respondent was a person who under the

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provisions of s. 22 was entitled to receive a certificate of exemption, and though the said charge might, in the absence of such certificate of exemption, have been considered as proved, we were of opinion under the circumstances stated that the alleged offence was of so trifling a nature that it was inexpedient to inflict any punishment, and we therefore dismissed the information."

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) (*Danckwerts*, with him), for the appellant. The magistrates were wrong. The decision of the commissioners as to granting certificates of exemption cannot be reviewed by justices: *Graham* v. *Haig* (1); *James* v. *Nicholas*. (2) The respondent, having neither a licence nor a certificate of exemption, must be convicted; and the magistrates are not justified in treating the offence as of a trifling nature under s. 16 of the Summary Jurisdiction Act, 1879, and refusing to convict. All the facts are before the Court, and it has jurisdiction to say that the offence is not of a trifling nature: *Banton* v. *Davies*. (3)

LINDLEY L.J. Sect. 22 of 41 & 42 Vict. c. 15, is, no doubt, not very happily worded; but it is quite obvious that if a person is keeping a dog and cannot produce either a licence or a certificate of exemption he must be convicted. No doubt the section says that a person complying with certain forms "shall be entitled to receive a certificate of exemption from duty"; but it is plain that it is within the discretion of the commissioners to grant or withhold such certificate, and at any rate that the justices have no power or jurisdiction whatsoever to review the decision of the commissioners on this point. The production of the certificate of exemption is the only means of escaping the payment of the penalty if the defendant is keeping a dog without a licence. Therefore, I hold that the magistrates were wrong in point of law in their decision.

The second point, however, is one of much greater difficulty. The magistrates say that in their opinion, if the respondent should be found by this Court to have committed an offence, that

(1) 58 J. P. 835. (2) 50 J. P. 292.
(3) 56 J. P. 294.

offence is of such a trifling character that it would be inexpedient to inflict any punishment for it, and that they would, therefore, dismiss the information. It is obvious that it would never do for this Court to encourage appeals from the refusal of justices to convict because they thought under s. 16 of the Summary Jurisdiction Act, 1879, that the offence was of so trifling a nature that it was inexpedient to inflict any punishment. The section runs thus: "If upon the hearing of a charge for an offence punishable on summary conviction under this Act, or under any other Act whether past or future, the court of summary jurisdiction think that, though the charge is proved, the offence was in the particular case of so trifling a nature that it is inexpedient to inflict any punishment or any other than a nominal punishment, the Court without proceeding to conviction may dismiss the information." The justices have, therefore, found that if it is an offence for the respondent to keep a dog without a licence, it is an offence of so trifling a nature that in their opinion it is inexpedient to inflict any punishment for it. That is really what their finding comes to. The difficulty which I feel arises from the words of the statute, which, no doubt, give the justices a very wide discretion. If they had required the respondent to pay for a licence, and had said that if he was willing to do so they would not convict, I do not think they would have exceeded the power given them by this section, and we should have had no power to interfere. But that was not the case. The ground they take is that for a man to refuse to take out a dog licence is a trifling offence, and I think it is impossible even under s. 16 that they should be at liberty to say that. They have no right to let a man off paying his dog tax, and if he refuses to pay it they are bound to convict him. Therefore, I think that unless the respondent is willing to take out a licence he must be convicted.

KAY L.J. I am of the same opinion. It is quite clear as to the first point that the justices are not a tribunal for reviewing the decision of commissioners in refusing exemption to a man. The magistrates were, therefore, clearly acting beyond their jurisdiction in saying that the commissioners ought to

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have granted a certificate of exemption to the respondent. They are not the judges of the question, and the evidence brought before them may be altogether different from that on which the commissioners had acted.

The rest of their finding really amounts to this—that even if they were wrong as to this exemption, and the respondent was therefore primâ facie liable to be convicted, the offence was a trifling one, and in their opinion not worthy of punishment, and therefore they would not convict. It comes to this—that as the commissioners have not granted a certificate of exemption to the respondent, although he refuses to pay for a dog licence, we (the magistrates) think his offence so trifling that we shall not convict. How can it be said that a man refusing to pay the dog tax commits a trifling offence? Of course, if all the facts were not before us we could not interfere with the discretion of the justices; but here we have not only a full account of them, but also what amounts to an explanation of the reason why the magistrates think the offence a trifling one. They think so because in their opinion the commissioners ought to have granted the respondent a certificate of exemption. They have no right to entertain that question, and therefore they have no ground for saying that the offence is trifling. In my opinion they were wrong in law, and were bound to convict the respondent.

Judgment for appellant.

Solicitor for appellant: *The Solicitor of Inland Revenue.*

A. P. P. K.

[CROWN CASE RESERVED.]

1895
Dec. 7.
1896
Feb. 3.

THE QUEEN *v.* RILEY.

Criminal Law—Obtaining Money by Forged Instrument—Forged Telegram—Forgery Act, 1861 (24 & 25 *Vict. c.* 98), *s.* 38.

The prisoner was indicted under s. 38 of the Forgery Act, 1861, for obtaining certain money by means "of a certain forged instrument, to wit, a forged telegram." It appeared that the prisoner, who was a clerk in a post office, sent to a bookmaker a telegram offering a bet on a certain horse for a certain race. The telegram purported to have been handed in prior to the running of the race, and the bookmaker accepted the bet and ultimately paid the amount won on that understanding. In reality the telegram was despatched by the prisoner after he had received the news that the race had been won by the horse in question:—

Held, by Hawkins, Mathew and Wills JJ. (Lord Russell of Killowen C.J. and Vaughan Williams J. doubting), that the telegram was a forged instrument within the meaning of s. 38, and that the indictment was good.

CASE reserved for the consideration of the Court by Kennedy J.

The prisoner was indicted under s. 38 of 24 & 25 Vict. c. 98, for that he "feloniously did cause and procure to be delivered and paid to one Henry Dorber certain money, to wit, the sum of nine pounds, the property and moneys of George Crompton and Samuel Radcliffe, under, upon, and by virtue of a certain forged instrument, to wit, a forged telegram, that is to say, a forged message and communication purporting to have been delivered at a certain post office, to wit, at Royal Exchange, Manchester, for transmission by telegraph, and to have been transmitted by telegraph to a certain other post office, to wit, the head post office at Manchester, with intent thereby then to defraud, he the said Henry Riley then well knowing the same forged instrument to be forged against the form, &c."

A second count charged him in similar terms with endeavouring to commit the same offence.

It appeared that the prisoner was a clerk in the telegraph department of the head post office at Manchester. He had obtained from Dorber permission to make bets in his name

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with Messrs. Crompton & Radcliffe, who were bookmakers, and with whom Dorber was in the habit of doing business. On June 27, 1895, the race known as the Newcastle Handicap was to be run at 2.45 P.M., and on that day the prisoner sent to Crompton & Radcliffe, in the name of Dorber, a telegram in these words—"Three pounds, Lord of Dale." The telegram purported to have been handed in at the Royal Exchange office at Manchester at 2.40 P.M., and to have been received at the head office at 2.51 P.M., from which office it was transmitted to Crompton & Radcliffe. In reality the telegram was not handed in at the Royal Exchange office at all, but it was despatched by the prisoner from the head office after the news had arrived there that the race had been won by Lord of Dale. Messrs. Crompton & Radcliffe, acting on their usual practice, and believing that the bet was offered before the race was run, accepted it at the current odds of 3 to 1 against Lord of Dale, and in the result credited Dorber with 9*l.*, which in due course would be received by the prisoner.

No suggestion of fraud was made against Dorber.

The prisoner pleaded guilty.

The questions on which the opinion of the Court was asked by the learned judge were—

(1.) Whether the telegram was a forged instrument within the meaning of s. 38, and whether the prisoner could be convicted on the indictment.

(2.) Whether the prisoner by pleading guilty must be taken as having admitted the facts appearing on the depositions.

F. H. Mellor, for the prisoner.

The Solicitor-General (*Sir R. B. Finlay, Q.C.*), *McCall, Q.C.*, and *Casserley*, for the Crown.

Cur. adv. vult.

Feb. 3. HAWKINS J. read the following judgment:—The main question for us to decide is whether the telegram upon which this indictment was preferred is a forged instrument according to the true interpretation of s. 38 of 24 & 25 Vict. c. 98.

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Messrs. Crompton & Radcliffe are bookmakers at Manchester. Their practice is to accept bets on horse-races offered them by telegram by persons desirous of backing horses, provided that on the face of the telegram it appears to have been handed in by the sender at a time earlier than that fixed for the running of the race upon which the bet is offered. On June 27 last a horse named Lord of Dale was about to run in the Newcastle Handicap, and the time fixed for the running of that race was 2.45 P.M. The prisoner on the afternoon of that day sent to Crompton & Radcliffe, in the name of a person named Dorber, a customer of theirs, and who had authorised the prisoner to use his name, a telegram which on the face of it purported to have been handed in at the Royal Exchange branch post office in Manchester at 2.40 P.M., and to have been received at the head office at Manchester at 2.51 P.M., whence it was sent out to Crompton & Radcliffe. The body of it was in these words—"Three pounds, Lord of Dale." The starting price odds against Lord of Dale at the time when the telegram purported to have been handed in were 3 to 1. This telegram was received by Crompton & Radcliffe at 3.15 P.M., and the bet was accepted by them in the ordinary course. Lord of Dale won the race, and upon the faith that the telegram had been handed in as it purported to have been, Crompton & Radcliffe in due course paid Dorber or allowed him in account the amount won by him, namely, the sum of 9*l*. The telegram was in fact not handed in at or sent from the Royal Exchange office at all, but was despatched by the prisoner from the head office in the form in which it reached Crompton & Radcliffe after the race had been run and won. It is fair to Dorber to say that it was not suggested that he was a party to that fraud.

By the 24 & 25 Vict. c. 98, s. 38, "Whosoever with intent to defraud shall demand, receive, or obtain, or cause or procure to be delivered or paid to any person, or endeavour to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever under, upon, or by virtue of *any forged or altered instrument whatsoever*, knowing the same to be forged or altered," shall be guilty of felony.

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The prisoner was indicted under that section for procuring, with intent to defraud, the payment to Dorber "by virtue of a *forged instrument*, to wit, a forged telegram, that is to say, a forged message and communication purporting to have been delivered at a certain post office, to wit, at Royal Exchange, Manchester, for transmission by telegraph, and to have been transmitted by telegraph to a certain other post office, to wit, the head post office at Manchester aforesaid, with intent then to defraud, he the said Henry Riley then well knowing the same forged instrument to be forged against the form of the statute, &c., and against the peace, &c."

There was a second count varying the charge, to which I need not refer.

To this indictment the prisoner pleaded guilty; but the learned judge (Kennedy J.) before whom the case came on to be tried, entertaining a doubt whether the telegram was an instrument within the meaning of s. 38, reserved that question for the consideration of the Court for Crown Cases Reserved; and also desired the opinion of the Court as to the sufficiency of the indictment.

As to the indictment: assuming the telegram to be an instrument within the meaning of the 38th section, I think the indictment sufficiently describes it. I consider that it would, after a plea of guilty, have been sufficient under s. 42 of the Act even had the indictment been for forging the instrument. A fortiori, it is so upon this indictment, which is not for forgery, but for procuring money to be paid by virtue of a forged instrument. I think it amply sufficient: see *Taylor* v. *Reg.* (1)

I proceed to discuss the question reserved for our consideration: whether the telegram described in the case constitutes a forged instrument in law; and whether it is such an instrument as is contemplated by s. 38.

My answer to both these questions is in the affirmative.

In 4 Blackstone's Commentaries, 247, forgery at common law is defined as "the fraudulent making or alteration of a *writing* to the prejudice of another man's right." I seek for no other definition for the purposes of the present discussion. That a

(1) [1895] 1 Q. B. 25.

postal telegram is a writing is to my mind clear. It originates in a written message addressed and signed by the sender, and delivered by him into the post office of despatch for the express purpose that it shall, in the very words in which it is penned, be transmitted by means of an electric wire to another post office, which I will call the arrival office, and that it shall there again on its arrival be committed to writing verbatim et literatim, and that such last-mentioned writing shall be handed to the person to whom it is addressed. The writing delivered in at the office of despatch is the authority of the postmaster to transmit the message, and of the postmaster at the arrival office to commit it to writing and to deliver it to the addressee as the sender's written message to him. This message sent out from the arrival office is, in my opinion, as binding upon the sender as though he had written it with his own hand. If I am right in this, it follows that an offer by telegram accepted by telegram might well create a contract sufficient to satisfy the Statute of Frauds between the sender and the addressee, and a verbal offer accepted by telegram might create an ordinary contract. For this there is the authority of the Court of Common Pleas so long ago as 1870: see *Godwin* v. *Francis*. (1)

Assuming the telegram to be such a writing as I have stated, a bare reading of the contents of it, coupled with the admission of its falsity and of the purpose for which it was made, are overwhelming to establish that it was fraudulently made to the prejudice of another man's right, and thus a forgery at common law. For this I need only cite the judgment of Blackburn J. in *Reg.* v. *Ritson* (2): "When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent, it is a forgery at common law."

In this case, unless the telegram was dated and despatched before the race was run, it would have been inoperative. The time of despatch was therefore material: falsely to write the telegram so as to make it appear that it was sent in for despatch before the race was run, when it was not sent in till afterwards,

(1) L. R. 5 C. P. 295.

(2) L. R. 1 C. C. 200, at p. 204.

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was to make it appear on the face of it to be that which it was not.

The more vexed questions, however, are whether the writing can be treated as an instrument, and, if so, whether it is such an instrument as is contemplated by the 38th section, the contention for the prisoner being that it cannot properly be treated as an instrument at all, and that, even if it can, that the 38th section has reference only to such forged legal or commercial instruments as are mentioned and the forgery of which is made felony in the earlier sections of the statute. After much consideration, I have formed an opinion adverse to the prisoner on both these points.

Now, can this telegram properly be called an instrument? I am not aware of any authority for saying that in law the term "instrument" has ever been confined to any definite class of legal documents. In the absence of such authority, I cannot but think the term ought to be interpreted according to its generally understood and ordinary meaning, as stated in the dictionaries of Dr. Johnson and of Webster. Both these give definitions first how the word is to be treated when applied to a chattel, namely, as "a tool used for any work or purpose." When applied to a writing, Dr. Johnson defines it as "*a writing* —a writing containing any contract or order." Webster's definition is "a writing expressive of some act, contract, process, or proceeding." When used generally, Dr. Johnson speaks of it as "that by means whereof something is done." Webster, as "one who, or that which, is made a means, or caused to serve a purpose." These definitions cover an infinite variety of writings, whether penned for the purpose of creating binding obligations or as records of business or other transactions.

Every one of the documents mentioned in the statute is unquestionably an instrument, and intended to be so treated. Throughout the statute it is evident the Legislature attached no rigid definite meaning to the word, for it is used in a variety of senses, all falling within one or other of the definitions of Dr. Johnson and Webster to which I have referred. Thus, in s. 1 of the Act, the word is used to signify a document having thereon affixed a counterfeit of the Great Seal. In ss. 9–14 the

word is used to denote the *tool, or implement* to be used for making a peculiar kind of paper. In ss. 16, 17, 18 the word is used to indicate tools for the manufacture of paper, plates, or implements to be used for carrying out forgeries. In s. 21 the expression is "testamentary instrument." In s. 29 the word is applied to written or printed documents made evidence by Act of Parliament. In s. 33 it is applied to writings purporting to be made by the Accountant-General of the Court of Chancery, &c. In s. 34 it refers to recognisances.

To most of the forged documents mentioned in the sections before s. 38 and declared to be felonies the term "instrument" is not applied at all, although no doubt could be suggested that they are intended to be treated as instruments within the meaning of the Act.

It will not, of course, be denied that there are very many instruments of an important character, commercial and otherwise, the forgery of which constitutes only offences at common law. I do not, for instance, find that the forgery of an ordinary written contract (not under seal or specially named in the statute) is a felony. So also a certificate of ordination, though the forgery of it is a mere common law offence, was nevertheless spoken of as an instrument by Blackburn J. in *Reg.* v. *Morton*. (1) I call attention to these undeniable facts for the purpose of shewing that there are many written documents of an important character beyond those mentioned in s. 38 to which the words "any instrument whatsoever" used in that section apply in addition to those documents mentioned in the statute.

In my view of the case, the telegram in question is an *instrument of contract*; it is the instrument which completed the wager offered by Crompton & Radcliffe to those who were able and disposed to accept it (see *Carlill* v. *Carbolic Smoke Ball Co., Limited* (2), and the cases there cited), and thenceforth an obligation was imposed upon each party in honour to fulfil it according to the result of the race. I say *in honour*, because, though it was clearly not an illegal contract, it could not be enforced by any legal process. In virtue of it, and upon the

(1) L. R. 2 C. C. 22. (2) [1892] 2 Q. B. 484; [1893] 1 Q. B. 256.

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assumption that the telegram was what it purported to be, Messrs. Crompton & Radcliffe paid the 9*l*.

Assuming the document to be an "instrument," I come to the only remaining question, whether it is such within the meaning of s. 38 of the statute. Why should it not be so? It is contended that the section has reference only to such instruments as are mentioned in the earlier sections of the statute, and that s. 38 applies only to those forged instruments which are punishable as felonies.

Such a construction is, I think, erroneous. There is no definition of the word "instrument" in the statute to fetter us in giving to it the ordinary and general interpretation. It was clearly the intention of the Legislature by s. 38 to create a new offence.

If it had been the intention of the Legislature to limit the operation of the section to felonious forgeries, how easy it would have been to use appropriate language for that purpose.

So far from doing this, the Legislature, having used the term "instrument" in a variety of senses all falling within one or another of the definitions I have above referred to, proceeds, in s. 38, to use language which read in its ordinary sense comprises *every description of written instrument*. What simpler, stronger, or more comprehensive words could they have employed than "*any forged* or altered instrument *whatsoever*" to convey an intention that *every forged* instrument should be covered by it, whether the forgery was a felony by statute or a misdemeanour at common law? I think the Legislature intended exactly what it has said; and I feel strengthened in this view by the declaration of Mr. Greaves, Q.C. (who had much to do in the framing of the Criminal Consolidation Acts, of which this is one), in that chapter of his work relating to these statutes (1) which treats of the construction of them, wherein he says: "The word '*whosoever*' is used throughout these Acts in the widest sense, so as to include every person capable of becoming a criminal." There is no reason why the

(1) The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict., with notes and observations by C. S. Greaves (London, 1861).

word "whatsoever" should not be interpreted in a similar spirit.

As to the word "any" he says: "It is also used in like manner so as to include every person or thing, or, at least, every person or thing other than the person or thing previously mentioned." Speaking of the expression "any other," he illustrates its intended interpretation by saying that the words "gunpowder or any other explosive substance" in s. 19 of the Offences against the Person Act are intended to include *every* explosive substance. He points out, also, in the latter part of that chapter, that (for reasons he has given) any argument as to a difference in the intention of the Legislature which may be drawn from a difference in the terms of one clause from those in another will be of no weight in the construction of such clauses. Moreover, in a note to the sections now under consideration, he says: "This clause is intended to embrace *every* case of demanding, &c., any property whatsoever upon forged instruments." I think no argument against the interpretation I have put upon s. 38 can be derived from s. 39 immediately following, for it expressly limits the operation of that section to statutory forgeries by enacting that whether such forgeries are created by that or any other Act the persons charged with them may be indicted as offenders against *that* Act. Again, in s. 40 the operation of which is confined to statutory forgeries, it is expressly and unmistakably so limited. Sect. 41 deals with the question of venue in all cases of forgery, expressly stating that it shall apply to all forgeries, whether by statute or at common law. Sect. 42 deals with what shall be a sufficient description in an indictment of "any instrument charged as a forgery," while s. 44, which makes it unnecessary to allege an intent to defraud any particular person, admittedly covers forgeries of every description without any exception, and expresses that intention by the very same words used in s. 38, "any instrument whatsoever." Is it possible that the Legislature, who clearly were alive to the difference between common law and statutory felonies, can have intended that a different construction should be put on these same words when used in s. 38?

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The result is that, in my opinion, the conviction ought to be affirmed.

In regard to a question suggested in the case, whether a person by pleading guilty to an indictment thereby admits the truth of the facts stated in the depositions, I think it right to express my opinion that he does not. He admits simply that he is guilty of the offence as charged in the indictment, and nothing more.

LORD RUSSELL of KILLOWEN C.J. read the following judgment of

WILLS J. The only question in this case is whether a post office telegram is an instrument within the meaning of 24 & 25 Vict. c. 98, s. 38.

After a careful study of the Act, I am of opinion that it is so. The Act is not very artistically drawn, and the words "instrument," "document," and "writing" are used in a manner which makes it sometimes difficult, at first sight, to say whether a real distinction is intended by the use of different words. Sects. 1–26, 28, 30, 32, 35, 36, 37, and 40 all relate to instruments or documents of various kinds known by definite designations, and so described. They, therefore, throw no light upon the present question.

Sect. 27 relates to the forgery of "documents" or "writings" intended to be used in evidence. Any writing so used would, in ordinary legal phraseology, be called part of the documentary evidence in the case, and probably this section would have been construed as including every description of writing so used, if the words "or writing" had been omitted. Sect. 29 relates to the forgery of "instruments" made evidence by Act of Parliament: this could only apply to writings of a more or less formal character; but this limitation follows from the subject-matter of the clause rather than from the use of the word "instrument."

Sect. 31 relates to the forgery of "documents" or "writings" made or issued under the provision of any Act of Parliament. The same remark applies. Such "documents or writings" must necessarily be of a more or less formal character, and the

phrase "document or writing" in this section would appear to mean exactly the same thing as "instrument" in s. 29.

The same remark applies to s. 33, where the corresponding phrase is "instrument or writing." In s. 34 the word "instrument" must, from the nature of the enactment, refer to writings of a formal character.

In s. 39, which relates to the forgery of "instruments or writings" designated in Acts of Parliament by any particular name or description, it is obvious that the meaning of the clause would have been exactly the same if the words "or writings" had been omitted.

Sects. 40–45 are a group of enactments for facilitating procedure and obviating mere technical difficulties. There is no reason why they should not have the widest construction, and be applied to every kind of offence which, either by statute or at the common law, constitutes a forgery.

On the contrary, there is every reason why sections inserted for the purpose of advancing justice by getting rid of mere useless technicalities should be applied to forgeries of every description. Some of these sections are older than the Act of 1861. In all that is material to the present discussion s. 42, which makes it unnecessary in the indictment to do more than describe the forged writing by any designation by which it may be generally known, is a repetition of 14 & 15 Vict. c. 100, s. 5; and s. 44, which makes it unnecessary to specify or prove more than an intent to defraud generally, is a repetition of part of s. 8 of the same Act, whilst the rest of the same s. 8 which applies the same rule to indictments for obtaining money by false pretences has been separately re-enacted in the Larceny Act (24 & 25 Vict. c. 96), s. 88. In s. 42 the expression used is "any instrument," and in s. 44 "any instrument whatsoever."

My own experience in drawing indictments goes back to 1851; and in my experience since that time it has been the practice to treat ss. 42 and 44 as applying to forgeries at common law as well as to statutory forgeries. Inquiry has satisfied me that the experience of others widely conversant with the subject agrees with my own.

The phrase used in s. 38, under which the present question

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arises, is "any instrument whatsoever." There can be no difference in meaning between this phrase and either of those used in ss. 42 and 44. It would be most unwise to throw a doubt upon the correctness of the interpretation put ever since 14 & 15 Vict. upon the words used in ss. 42 and 44, nor is there the slightest ground for doing so; and the only question is whether there is any more reason for restricting the meaning of "instrument" in s. 38 than there is in those sections. I can see none.

It seems to me obvious that the words "instrument," "document," and "writing" have not been selected for any particular logical reason to be used in any particular section, and that whether they are to have a restricted or a general sense must be gathered from the nature of the particular enactment. I have pointed out some sections where the context does necessarily restrict the application; but even there it is rather the application than the meaning of the term adopted that is so narrowed.

Sect. 38 provides that "whosoever, with intent to defraud, shall demand, receive, or obtain or cause or procure to be delivered or paid to any person, or endeavour to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever under, upon, or by virtue of any forged or altered instrument whatsoever, knowing the same to be forged or altered, or under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, shall be guilty of felony and being convicted thereof shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years."

The essence of this section appears to be, that where property has been obtained not merely by false pretences, but by false pretences into which forgery or its equivalent enters, the offence shall be constituted a felony, and may involve much severer

punishment than either the mere obtaining of money by false pretences or a mere forgery at common law.

I cannot see anything in the nature of such a section which should make it necessary or desirable to restrict the application of the word "instrument" to writings of a formal character, and I think it is meant to include writings of every description if false and known to be false by the person who makes use of them for the purpose indicated.

The severity of the possible punishment has been appealed to as a reason for restricting the application of the section to documents of a more formal character, or documents having in themselves some legal operation. The argument appears to me to have no weight. The section embraces cases involving forgeries which may be of a very heinous nature, such as forgeries of wills or letters of administration. It always involves the commission of one crime by means of another. There is no minimum of punishment, and the limits of discretion are not unreasonable. Theoretically a boy may be sent to penal servitude for five years for stealing an apple, and that though it be his first offence; and the limits of discretion in cases of many offences, whether triable at quarter sessions or at assizes only, are equally large.

No violence is done by this construction to the use of the word "instrument." In *Coogan's Case* (1) Buller J. defined forgery at common law as the "making of a *false instrument* with intent to deceive." Blackstone J. defines forgery as the "fraudulent making or alteration of a *writing* to the prejudice of another man's right": 4 Comm. 247. It is plain that in these definitions "instrument" and "writing" are synonymous. East, himself a writer of considerable authority, defines forgery in one passage as "a false making—a making malo animo of any written *instrument* for the purpose of fraud and deceit" (2 Pleas of the Crown, 852); and in another paragraph as "the counterfeiting of any *writing* with a fraudulent intent whereby another may be prejudiced" (Ib. 861). It is obvious that the writer in these passages treats "instruments" and "writings" as for the present purpose synonymous.

(1) 1 Lea. 449; 2 East, P. C. c. 19, s. 43, p. 948.

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For these reasons I am clear that the conviction must be affirmed.

I think further that, even if the true construction of the word "instrument" required a more restricted meaning, the telegram in the present case would fall within it. It was a writing which, if accepted and acted upon, would establish a business relation and lead directly to business dealings with another person. It is true that the dealings were of such a nature that they led to no legal rights, and could not be made the foundation of an action; but they were not forbidden by law, and in that sense and to that extent were legitimate. A post office telegram is issued by a public department in the course of business, and in the present case the telegram appears to me to have sufficient formality, both in its origin and in the use to which it was put, to deserve the name of an "instrument." The only hesitation I have in saying so is lest it should appear to imply any lingering doubt in my own mind as to the correctness of the wide meaning I have given in the principal part of my judgment to the word "instrument." I have no doubt or hesitation about the matter, and I notice the second point only because it was argued before us.

LORD RUSSELL of KILLOWEN C.J. I have only one observation to add to the judgments which have just been read. It is obvious that this case is not one of general importance, although it is, of course, of importance to this particular prisoner, because it is quite clear that the prisoner in what he did committed an act of forgery at common law; it is also clear that he committed a serious misdemeanour within the Telegraph Act, and it is probable that his conduct also amounted to an obtaining of money by false pretences. I do not desire to dissent from the result at which the majority of this Court have arrived; but for my own part I share the doubts expressed by my brother Vaughan Williams in the judgment which he is about to read. Mathew J. authorises me to state that he concurs in the decision of the majority of the Court.

VAUGHAN WILLIAMS J. read the following judgment:—I concur in the opinion that the defendant, on the facts of this

case, was guilty of counterfeiting a writing with intent to defraud, and therefore of forgery by the common law; but I do not think he was guilty of any statutory forgery, or that the telegram sent falls within the description of any of the written instruments, the forgery of which is made felony by 24 & 25 Vict. c. 98; but I propose to make some observations on the question whether the defendant was guilty of an offence within s. 38 of that statute.

This question turns on the meaning, in s. 38 of 24 & 25 Vict. c. 98, of the words "any forged or altered instrument whatsoever." Do these words mean any writing whatever, or ought these words to be read subject to some, and what, limitation?

Two possible limitations occur to one: (*a*) that "instrument" must be read, not as including all writings, but only such writings as contain a contract, order, or legal act of the writer; (*b*) that "instrument" in s. 38 means a writing the forgery of which is made a felonious forgery in the preceding sections.

The statute is a consolidating and amending Act relating to indictable offences by forgery—i.e., consolidating and amending the statute law relating to offences which are made forgery by statute. The greater part of the sections are culled from older statutes and put, as it were, on a statutory file. In construing such sections, I do not think one ought to let the meaning of a word in one section affect the construction in another section unless the sections are plainly connected. As to limiting the word "instrument" to contracts, orders, and legal acts, I do not think that the meaning to be attached to the word in the various sections of the Act affords any guide to the meaning of the Act in s. 38. The meaning is sometimes the limited meaning, sometimes the wide meaning.

The meaning, however, in each case is to be derived from the collocation of the word with the provisions of the particular section. The use of the word "instrument" in this Act as a whole does not in any case seem to afford any assistance. I mention this because undue stress seems to me to be attached to the use of the word "instrument" in s. 42.

I think one must construe the words "any . . . . instrument

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Vaughan Williams J.

whatsoever" in s. 38 in reference to their collocation in s. 38, and not in reference to the use of the word "instrument" in other sections of the Act; but, applying this guide of construction, I find nothing to lead me to the conclusion that "instrument" in that section is limited to writings containing a contract or legal Act.

Secondly, as to limiting "any instrument . . . . whatsoever" to writings the forgery of which is made felony by the preceding sections, it will be observed that the first thirty-eight sections deal with the forgery of specific instruments, writings, or matters, or with matters connected with each such offence—each group of sections is introduced with a heading, *e.g.*, "As to forging deeds, wills, bills of exchange, &c."

Sect. 38 itself is headed, "As to demanding property upon forged instruments." The sections following s. 38 are headed "As to other matters." Do the words "by virtue of any forged or altered instrument whatsoever" in s. 38 mean any of the forged instruments dealt with in the preceding sections? Do they refer exclusively to the offences created by the Act? I am inclined to think that this is the true construction, remembering that we are construing a penal statute.

The subject of the Act up to s. 38 has been statutory forgery, *i.e.*, felonious forgery. This section creates an offence with reference to forged instruments. Does it not mean any instrument being one of those of which the forgery is made felony by this Act? One reason for attributing this meaning is that the offence of demanding property upon forged instruments is made felony. This is quite reasonable if the forgery of the instrument itself with intent to defraud is made felony; but it seems unreasonable, in a case where the forgery with intent to defraud of the writing itself is not felony, to make the demanding property upon it felony. It seems unreasonable to make what may be the lesser offence felony, when what may be the graver offence is not felony. On the whole, I think that s. 38 is the supplement of the preceding sections, and that "instruments" must be limited to instruments (using the word in its widest sense) the subject of the preceding sections.

But, although this is the inclination of my mind, I am

not prepared to differ if the majority of the judges think otherwise.

1896

THE QUEEN v. RILEY.

Conviction affirmed.

Solicitor for prisoner: *Riley, Blackburn.*

Solicitor for Crown: *The Solicitor to the Post Office.*

A. P. P. K.

BIRCHALL AND OTHERS *v.* BULLOUGH.

1896

Feb. 12.

Evidence—Unstamped Document—Cross-examination—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 14, *sub-s.* 4.

In an action for money lent, an insufficiently stamped promissory note, purporting to be signed by the defendant and expressed to be given for money lent, was put into the defendant's hands by the plaintiffs' counsel for the purpose of refreshing his memory and obtaining from him an admission of the loan:—

Held, that the plaintiffs were entitled to use the note for that purpose, notwithstanding the provision of the Stamp Act, 1891, that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever."

APPEAL from the county court of Lancashire.

The plaintiffs, as executors of Peter Brindle, deceased, sued for money lent by their testator to the defendant. The plaintiffs interrogated the defendant as to whether he did not sign a certain promissory note dated June 3, 1889, whereby he promised to pay to Peter Brindle the sum of 30*l.* 15*s.* one month after date for money lent. The defendant objected to answer the interrogatory on the ground that the note in question was inadmissible in evidence, being insufficiently stamped with a penny stamp. At the hearing the defendant was called upon to answer the interrogatory, the defendant's counsel objecting. The judge overruled the objection. Upon the note being put into the defendant's hands, he admitted that the signature to it was his, that after refreshing his memory by reading the note he did not believe he should have signed it if he had not received the money, and that he had no recollection of paying it back. The judge gave judgment for the plaintiffs. The defendant appealed.

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R. V. Bankes, for the defendant. The note, being insufficiently stamped, ought not to have been used at all, and the defendant ought not to have been required to look at it. For s. 14, sub-s. 4, of the Stamp Act, 1891, provides that an instrument insufficiently stamped, as this was, "shall not . . . . be given in evidence or be available for any purpose whatever." To hold that the prohibition contained in that section against the use of an unstamped document is confined to the use of it as an instrument of evidence is to give no value to the words "or be available for any purpose whatever." And if the note had not been used for the purpose for which it was used, there would have been no evidence of any receipt of the money by the defendant. [He referred to *Ashling* v. *Boon*. (1)]

Loehnis, for the plaintiffs, was not called upon.

WRIGHT J. All that was done with the note in this case was to put it into the defendant's hands for the purpose of challenging his recollection, and that was, in my judgment, a purpose for which the plaintiffs' counsel was quite entitled to use it. The judge does not appear to have admitted the note as evidence. But even if he did, there was quite sufficient evidence without it in the admissions made by the defendant to support the judge's finding.

BRUCE J. I am of the same opinion. Although a document may be inadmissible in evidence, a witness may be called upon to look at it, and, having looked at it, to say whether he did not, in fact, borrow a certain sum of money. I can see nothing improper in that, and that is all that happened here.

Appeal dismissed.

Solicitors for plaintiffs: *Rowcliffes & Rawle, for Horn, Wigan.*
Solicitors for defendant: *Woodcock, Ryland & Parker.*

(1) [1891] 1 Ch. 568.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1896
Feb. 10.

THE QUEEN on the Prosecution of ROBERT CHAPMAN *v.* THE INCORPORATED LAW SOCIETY.

Solicitor—Misconduct—Jurisdiction of Committee of Incorporated Law Society—Affidavit disclosing no Primâ Facie Case—Right of Committee to decline to take further Proceedings—Solicitors Act, 1888 (51 & 52 *Vict. c.* 65), *ss.* 13 *and* 19.

Upon an application made under s. 13 of the Solicitors Act, 1888, to the Incorporated Law Society, requiring them to call upon a solicitor to answer allegations of misconduct made in the applicant's affidavit, the committee have a discretion not to proceed further in the matter of the application, if they come to the conclusion that the affidavit discloses no case which the solicitor ought to be called upon to answer.

Application for an extension of time for appealing from a judgment of the Divisional Court delivered on July 29, 1895, and reported [1895] 2 Q. B. 456.

The prosecutor applied to the Incorporated Law Society to require a firm of solicitors to answer certain allegations of misconduct contained in an affidavit. The committee of the society decided that the affidavit disclosed no primâ facie case of misconduct against the solicitors, and declined to hold any further inquiry or to require the solicitors to answer the allegations in the affidavit. The applicant thereupon obtained a rule nisi for a mandamus to the Incorporated Law Society, directing them to hear the application and report thereon to the Court under s. 13 of the Solicitors Act, 1888 (1),

(1) 51 & 52 Vict. c. 65, s. 13, enacts: "An application to strike the name of a solicitor off the roll of solicitors (whether at the instance of the solicitor himself or of any other person), or an application to require a solicitor to answer allegations contained in an affidavit, shall be made to and shall be heard by the committee, in accordance with rules to be made under the authority of this Act.

"The committee after hearing the case, shall embody their finding in the form of a report to the High Court of Justice, except where the application is made at the instance of the solicitor himself, in which case the report shall be made to the Master of the Rolls, who shall make such order thereon as he shall think fit.

"If the committee are of opinion that there is no primâ facie case of misconduct against the solicitor, the society need not take any further

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THE QUEEN v. INCORPORATED LAW SOCIETY.

and this rule was, upon cause shewn, discharged by the Court. (1)

The time for appealing against this order elapsed, and the prosecutor applied to a Divisional Court to have the order rectified on the ground that it had been wrongly drawn up. This application was refused, and the prosecutor appealed against the refusal, and at the same time applied for an extension of time for appealing against the original order. The questions arising on the appeal (which was dismissed) are not material to this report.

W. Willis, Q.C., for the prosecutor. The 13th section of the Act is explicit that an application to require a solicitor to answer allegations contained in an affidavit shall be made to, and shall be heard by, the committee. The discretion given to the society not to take further proceedings does not arise until the committee have heard the case. Merely forming a judgment as to the sufficiency of the affidavit is not hearing the case, and the action of the committee amounts to a refusal to perform their duty under the Act. That duty is a public one, and may be enforced by mandamus. In order to enable the prosecutor to raise this point, the time for appealing against the order of July 29 last should be extended.

Hollams, for the Incorporated Law Society, and *Levett, Q.C.*, and *A. T. Lawrence*, for the solicitors, were not called upon.

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proceedings; but if the committee are of opinion that there is a primâ facie case, it shall be the duty of the society to bring the report of the committee before the Court.

"The report shall have the same effect, and shall be treated by the Court in the same manner, as a report of a master of the court; and the Court may make such order thereon as to the Court may seem fit.

"Provided that any person who, but for this Act, would have been entitled to apply to the Court to strike a solicitor off the roll of solicitors, or to apply to require a solicitor to answer allegations contained in an affidavit, shall be entitled so to apply although the committee is of opinion that there is no primâ facie case of misconduct against the solicitor, and shall be entitled to be heard if the society brings the report of the committee before the Court."

The rules of January 31, 1889, applicable to the case are set out in the report in the Court below ([1895] 2 Q. B., at p. 458).

(1) [1895] 2 Q. B. 456.

LORD ESHER M.R. What an applicant has to do who makes a charge against solicitors is to state the facts on which he relies to support the charge in an affidavit, and to send that affidavit to the Incorporated Law Society. The committee of the society have the affidavit before them; and if they come to the conclusion that it does not disclose a primâ facie case of misconduct, the Act says that they need not take any further proceedings. It is now said that even if they come to such a conclusion they are bound to hear the applicant, and that unless they do so they have not heard the case within the meaning of s. 13 of the Act; but the intention of the Act is perfectly clear that if the affidavit discloses no primâ facie case there is no need that the committee should take any other step.

This does not preclude an appeal to the Court; for the applicant is at liberty to apply to the Court, although the committee are of opinion that there is no primâ facie case of misconduct made out, on which point they are the sole judges. If this were not so, the consequence would be that, although the committee came to the conclusion that on the face of the affidavit the application was absurd, there would still have to be a regular inquiry with witnesses. This was not the intention of the Act, and the application is groundless.

LOPES and RIGBY L.JJ. concurred.

Application refused.

Solicitors for Incorporated Law Society: *S. P. B. Bucknill.*
Solicitor for prosecution: *R. Chapman.*
Solicitors for solicitors charged: *Trower, Freeling & Parkin.*

A. M.

1896
Feb. 4, 10.

LONDON COUNTY COUNCIL *v.* PRYOR.

Metropolis—Management Acts—General Line of Buildings—Forecourt and Garden occupied with House—Right to Build on beyond General Line—Metropolis Management Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 75.

One of a continuous row of houses in a street in the metropolis, having in front forecourts forty-eight feet deep and at the back gardens ninety feet deep, was pulled down, and upon its site a new street was made at right angles to the existing street. The owner of one of the adjoining houses, having without the consent of the London County Council begun to erect over the whole length of his forecourt and garden buildings fronting on the new street and projecting beyond the general line of buildings in that street, was summoned under s. 75 of the Metropolis Management Act, 1862:—

Held, that he was not entitled to erect such buildings beyond the general building line.

Lord Auckland v. *Westminster District Board of Works* (L. R. 7 Ch. 597) distinguished.

CASE stated by a metropolitan police magistrate.

Prior to the year 1890 there was situate in Stoke Newington Road, in the parish of Stoke Newington in London, a continuous row of houses numbered 69 to 85 (odd numbers only), fronting to that road, and having forecourts in front and gardens at the back. In 1890 a new street, called Prince George Road, was made at right angles to the Stoke Newington Road. To enable such street to be made No. 81, Stoke Newington Road was pulled down, and the sides of the forecourt and garden of the adjoining house, No. 83, were set back a few feet, though the house itself, No. 83, was left standing. On October 20, 1894, the respondent, who is a builder, began to erect for the owner of Nos. 83 and 85, Stoke Newington Road, without the consent of the appellants, buildings on the side of Prince George Road, which buildings occupied the whole of the forecourt and garden of No. 85, and so much as remained of the forecourt and garden of No. 83. On January 22, 1895, the appellants' superintending architect by his certificate decided the general line of buildings in Prince George Road, which line was seven feet farther back from the said road than the front line of the buildings so begun to be

erected by the respondent, and he decided that the buildings were in Prince George Road. The length of the forecourt of No. 83 is forty-eight feet, and that of the garden at the back is ninety feet.

On April 1, 1895, the respondent appeared before the police magistrate to answer a complaint made by the appellants under s. 75 of the Metropolis Management Act, 1862 (1), that he had unlawfully begun to erect the said buildings beyond the general line of buildings in Prince George Road without the consent in writing of the appellants. The magistrate was of opinion, upon the authority of *Lord Auckland* v. *Westminster District Board of Works* (2), that the forecourt and garden of the house in question having been occupied with the house were to be treated as part of the house, and that the respondent was entitled to build upon the site of such forecourt and garden even beyond the general line of buildings. He accordingly dismissed the summons, subject to a case for the opinion of the Court.

Avory and *Daldy*, for the appellants. The decision in *Lord Auckland* v. *Westminster District Board of Works* (2) does not support the respondent's claim. What that case decided was that s. 75 of the Metropolis Management Act, 1862, applies only to sites upon which buildings are being erected for the first time, and in respect of which there is no vested building right to be considered, and it was there held that sites of old buildings which had been pulled down for the purpose of rebuilding were not within the section. Here the buildings which the respondent has begun to erect upon the garden and forecourt are buildings which are being erected for the first time. It is true that in *Lord Auckland's Case* (2) the owner was held entitled to rebuild upon the space formerly occupied by a courtyard as well as upon the actual site of the old house. But the distinction between the owner's rights in respect of the courtyard and in respect of

(1) This section is repealed by the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.); but although that Act received the Royal Assent on August 25, 1894, before the respondent began to erect the buildings complained of, it came into operation only on January 1, 1895.

(2) L. R. 7 Ch. 597.

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the house was not much discussed, though the decision may possibly be justified on the ground that the space occupied by the courtyard was trifling. If, however, it proceeded upon the ground mentioned in the judgment of Mellish L.J. that the courtyard was a private place and not in any way dedicated to the use of the public, that case must be regarded as in conflict with the later authorities of *Barlow* v. *Kensington Vestry* (1), *Worley* v. *Vestry of St. Mary Abbotts, Kensington* (2), and *Lavy* v. *London County Council.* (3) In the last-named case it was decided that a dwarf wall of a forecourt was not a building so as to entitle the owner to pull it down and erect a building on its site, and the necessary inference from that decision is that the possession of a wall does not give a right to build on the forecourt which it bounds.

McCall, Q.C., and *Macmorran, Q.C.*, for the respondent. The decision in *Lord Auckland's Case* (4) is to the effect that for the purposes of s. 75 any inclosed space, such as a garden or courtyard, which is occupied in connection with a house is to be treated as part of the house itself. The judgment of Mellish L.J. is not dissented from in any subsequent case. It may be that if the space occupied in connection with the house is very large it could not properly be treated as part of the house. But whether it can be so treated or not is in each case a question of degree, and therefore one of fact. And it must be taken that the magistrate has found that fact in the present case in the respondent's favour. In *Lavy* v. *London County Council* (3) the only point discussed was whether the wall was a building; the question whether the forecourt was vacant land was never dealt with.

Daldy, in reply.

LAWRANCE J. The magistrate seems to have held as matter of law that the facts in this case are covered by the authority of *Lord Auckland* v. *Westminster District Board of Works* (4), and the question which he has left to us is whether he was right in

(1) 27 Ch. D. 362. This case was reversed by the House of Lords (11 App. Cas. 257), but on a different point.

(2) [1892] 2 Ch. 404.

(3) [1895] 2 Q. B. 577.

(4) L. R. 7 Ch. 597.

so holding. In my opinion he was not. In that case a house had been pulled down, and it was proposed to rebuild upon the site of the house, including a yard which had been occupied with the house. It was held that the owner might do so notwithstanding that the buildings proposed to be erected would project beyond the general building line. But there the area of the yard bore a very small proportion to that of the site of the house, so that it might very reasonably be treated as part of it. Here the case is very different. What it is proposed to build upon here is a forecourt forty-eight feet long and a garden ninety feet long. And I think the cases of *Lavy* v. *London County Council* (1) and of *Barlow* v. *Kensington Vestry* (2) are strong authorities to shew that to build in the manner in which it is proposed to build in the present case is not permissible. The appeal must, therefore, be allowed.

COLLINS J. I am of the same opinion. If I thought that the magistrate had decided as a fact that the facts of this case were on all-fours with those in *Lord Auckland* v. *Westminster District Board of Works* (3), I should have held that I had no jurisdiction to deal with the matter. But I think that his intention was to set out the facts as found by him, and ask us as a question of law whether those facts fell within the decision in that case or not. Now, in *Lord Auckland's Case* (3) unquestionably land which had not previously been covered by building, but which was part of the appurtenances of a house which had been pulled down, was held to be part of the house so as to entitle the owner, when rebuilding the house, to build over the space which had been so previously unbuilt upon. But the plot of ground in question in that case was presumably of but small dimensions. On the other hand, in *Lavy* v. *London County Council* (4), where there was a house with a forecourt bounded by a dwarf wall, and the owner pulled down the dwarf wall and erected on its site a higher wall intended to be used as a screen for advertisements, the Court of Appeal held that he had no right to build such new wall beyond the general line

(1) [1895] 2 Q. B. 577.
(2) 27 Ch. D. 362.
(3) L. R. 7 Ch. 597.
(4) [1895] 2 Q. B. 577.

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Collins J.

of buildings in the street; whereas, if the contention of the respondent here were right, the owner in that case would have been entitled to build in front of the general building line, not only on the site of the old dwarf wall, but also over the whole space occupied by the forecourt. It seems, then, that the principle to be gathered from the decisions is that the doctrine of *Lord Auckland's Case* (1) does not apply to any plot of ground which cannot be reasonably described as part of the building in connection with which it is occupied. Whether it can be so described must depend to a great extent upon its dimensions, and must consequently in each case be a question of degree. If the area is as large as it is here, the forecourt being forty-eight feet long and the back garden considerably longer, a point is reached at which it may be said that there is no evidence upon which a magistrate could reasonably hold the land to be part of the building to which it is appurtenant. I am of opinion, therefore, as matter of law, that the facts of this case do not fall within the decision in *Lord Auckland's Case* (1), and that the decision of the magistrate must be reversed.

Appeal allowed.

Solicitor for appellants: *Blaxland.*

Solicitors for respondent: *Edell & Gordon.*

(1) L. R. 7 Ch. 597.

J. F. C.

[IN THE COURT OF APPEAL.]

C. A.
1896
Jan. 17;
Feb. 17.

HARDAKER *v.* IDLE DISTRICT COUNCIL.

Principal and Agent—Contractor—Liability of Principal for Negligence of Contractor—Public Body—Breach of Duty—Damage—Remoteness—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.

A district council, being about to construct a sewer under their statutory powers, employed a contractor to construct it for them. In consequence of his negligence in carrying out the work a gas-main was broken, and the gas escaped from it into the house in which the plaintiffs (a husband and wife) resided, and an explosion took place, by which the wife was injured, and the husband's furniture was damaged. In an action by the plaintiffs against the district council and the contractor:—

Held, that the district council owed a duty to the public (including the plaintiffs) so to construct the sewer as not to injure the gas-main; that they had been guilty of a breach of this duty; that, notwithstanding that they had delegated the performance of the duty to the contractor, they were responsible to the plaintiffs for the breach; and that the damages were not too remote to be recovered.

Decision of Wright J. reversed.

APPLICATION by the plaintiffs, Tom Hardaker and his wife, that the judgment entered at the trial of the action for the defendant district council might be set aside, and that judgment might be entered for the plaintiffs against the district council, or in the alternative that a new trial might be ordered between the plaintiffs and the district council.

The action was brought against the Idle District Council and Abraham Thornton, who was a contractor, for having in the construction of a sewer been guilty of negligence by omitting to keep a gas-pipe properly supported, so that it became fractured, and the gas escaped out of it into the plaintiffs' house, and exploded, the result being that the furniture of the husband in the house was wrecked, and the wife, who was in the house at the time, was seriously injured.

On October 10, 1894, the Idle Local Board (the predecessors of the district council) gave notice, under the provisions of the Public Health Act, 1875, s. 150, to the husband to construct a sewer in Moorfield Place, he being the occupier of a house

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abutting thereon; and, the notice not being complied with, the board, as they were empowered to do by the section, proceeded themselves to execute the works mentioned in the notice.

In order to carry out these works the local board, by indenture under seal, contracted with the defendant Thornton that he should construct the sewer for them, in accordance with a specification, bill of quantities, and drawings thereto annexed, for the sum of 157*l.* 16*s.* 4*d.*

The contract contained the following clauses:—

7. "The contractor to execute the whole of the work in the most workmanlike and substantial manner, particular attention being paid to any directions or instructions of the inspector (of the board), which may be given by him from time to time as the work proceeds, and, if any difference of opinion shall arise as to the description, quality and quantity of materials or workmanship, or anything relating to the works, the opinion of the inspector shall be final and binding on all parties concerned."

8. "The contractor shall give or provide all necessary personal superintendence during the execution of the works, and shall employ competent foremen to superintend the same during their progress, and, should any such foremen, or the contractor's workmen, at any time disobey the orders of the inspector, or conduct themselves improperly, or be in his opinion incompetent, the inspector shall have full power to discharge them forthwith, and the contractor shall not employ any discharged man on the works again without the permission of the inspector, but shall be bound within three days to replace any person or persons so discharged by others approved by the inspector."

11. "The inspector shall have power to stop the works, or any portion thereof, absolutely at any stage, to enlarge, diminish, modify, alter, or vary the works, or any part thereof, and also to alter or vary the description of the materials to be used from time to time, and such alterations shall not annul or invalidate the contract, which shall, nevertheless, remain in full force and effect. Any extension, reduction, alteration, modification, or variation, as aforesaid, shall, to all intents and purposes, be deemed and taken as having formed part of the contract, and

the price or value of any additions to or deductions from the contract price consequent thereupon shall be ascertained and determined by the inspector, whose decision shall be final and binding upon all parties."

14. "The care of the entire works until their completion shall remain with the contractor, who shall be held responsible for all accidents and damage to persons or property arising therefrom from any cause whatsoever, and chargeable for anything that may be stolen, removed or destroyed. The contractor shall, at his own expense, protect all walls, buildings, gas-pipes, water-pipes, or other property which may be laid bare or otherwise interfered with, and make good any such property which may be damaged, removed, disturbed or injured during the progress of the works, or in consequence thereof; and shall also make good all damage occasioned by delay or neglect, or carelessness, deficiency in strutting, fencing, watching, or lighting, either to the works or to the buildings or premises adjoining or near thereto, whether such damage or defects be discovered during the progress of the work, or appear or become known after the completion thereof; and no payment on account of the works, or certificate or approval of any work by any officer of the local board, shall affect or prejudice the rights of the local board against the contractor in this respect. . . . In case of any claim, action, suit, or proceedings being brought or taken against the local board, or any of their officers or servants, in respect of any loss, damage, or injury caused by the works, or consequent thereupon, the contractor, or his sureties, shall fully indemnify them and each of them therefrom, and forthwith pay to him or them all costs, charges, damages and expenses which he or they shall have been put to or have incurred in reference thereto."

45. "Where gas or water pipes are found in the line of the sewers, care shall be taken that no breakages occur. Where needful the contractor shall place strong timbers across the trench and sling the gas or water pipes to them by wrought-iron chains of sufficient strength."

46. "Where in the opinion of the inspector it is desirable so to do, the contractor shall lower the timbers and slings to or

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below the level of the adjacent surface and build up concrete walls thereunder; in such cases the contractor will be paid the value of the timbers, slings, concrete and labour, provided he has, as is herein provided, obtained the written certificate of the inspector, or his written order, for such extra works."

It was proved at the trial before Wright J. with a jury that the defendant Thornton had been guilty of negligence by insecurely packing the soil around a gas-pipe in use after the excavation had been made for the sewer, whereby the gas-pipe was broken and the gas escaped and found its way into the plaintiffs' house, where it exploded.

The learned judge held that the district council were not liable for the negligence of their contractor. The jury found a verdict for the plaintiffs as against the defendant Thornton, and assessed the damages at 45*l*. Judgment was accordingly entered for the district council, and judgment was entered for the plaintiffs as against Thornton for 45*l*.

Kershaw, *Q.C.*, and *W. J. Waugh*, for the plaintiffs. The learned judge ought to have held that the district council, as well as the contractor, were liable to the plaintiffs.

1. Upon the true construction of the contract the relation between the council and the contractor was that of master and servant. Unless that relation existed the council would not be liable for the collateral negligence of the contractor: *Dalton* v. *Angus* (1); *Gray* v. *Pullen* (2); *Pickard* v. *Smith*. (3)

2. Even if the relation of master and servant does not exist, an employer is liable for the negligence of the man whom he employs in the doing of an act which the employer has expressly ordered him to do: *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (4) This principle applies here.

3. Whenever a duty is cast upon a person who is doing an act he is liable for the proper performance of that duty, and he cannot escape from his responsibility by delegating the performance of the duty to a contractor. He remains liable to those who are injured by the non-performance of the duty, even

(1) 6 App. Cas. 740, 829.
(2) 5 B. & S. 970.
(3) 10 C. B. (N.S.) 470.
(4) 6 H. & N. 488.

though the contractor has agreed to indemnify him: *Bower* v. *Peate* (1); *Gray* v. *Pullen*. (2)

The district council stand in this position.

Tindal Atkinson, Q.C., and *Longstaffe*, for the district council.

1. The contract does not make the contractor the servant of the council. The true test whether the relation of master and servant is constituted is whether the person employed cannot act at all without the direction of the employer. That is not the effect of this contract. The power of dismissing incompetent workmen is not sufficient to render the council liable: *Reedie* v. *London and North Western Ry. Co.* (3) The council had no control over the contractor's servants.

2. There is nothing to shew that the explosion was the direct result of any order given by the council or their inspector. The inspector was under no obligation to give any directions, and it is not proved that he gave any.

3. The council did not owe any special duty to the plaintiffs; their only duty to them was the duty which they owed to them in common with the public generally. That is not sufficient: *Hughes* v. *Percival*. (4)

[RIGBY L.J. In *Tarry* v. *Ashton* (5) there was only a general duty to the public.]

At any rate, the damages are too remote: *Sharp* v. *Powell* (6); *Burrows* v. *March Gas and Coke Co.* (7)

Kershaw, Q.C., in reply. As to remoteness of damage, it is the natural consequence of allowing gas to escape that it will explode, and he who allows it to escape must be liable for the consequences: *Hadley* v. *Baxendale*. (8)

The council were executing the works under their statutory powers, and they owed a duty to all the world to see that the gas-pipe was properly protected. *Bower* v. *Peate* (9) was not impeached in *Hughes* v. *Percival*. (4)

Cur. adv. vult.

(1) 1 Q. B. D. 321, 326.
(2) 5 B. & S. 970.
(3) 4 Ex. 244.
(4) 8 App. Cas. 443.
(5) 1 Q. B. D. 314.
(6) L. R. 7 C. P. 253.
(7) L. R. 5 Ex. 67; 7 Ex. 96.
(8) 9 Ex. 341.
(9) 1 Q. B. D. 321.

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Feb. 17. LINDLEY L.J, .after stating the facts and reading the above clauses of the contract, read the following judgment:—The powers conferred by the Public Health Act, 1875, on the district council can only be exercised by some person or persons acting under their authority. Those persons may be servants of the council or they may not. The council are not bound in point of law to do the work themselves—i.e., by servants of their own. There is nothing to prevent them from employing a contractor to do their work for them. But the council cannot, by employing a contractor, get rid of their own duty to other people, whatever that duty may be. If the contractor performs their duty for them, it is performed by them through him, and they are not responsible for anything more. They are not responsible for his negligence in other respects, as they would be if he were their servant. Such negligence is sometimes called casual or collateral negligence. If, on the other hand, their contractor fails to do what it is their duty to do or get done, their duty is not performed, and they are responsible accordingly. This principle lies at the root of the modern decisions on the subject, and the distinction between the two classes of cases is well illustrated by comparing *Reedie* v. *London and North Western Ry. Co.* (1) with *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (2) In the first of these cases the defendants employed a contractor to build a bridge. One of his men carelessly let a stone fall on the plaintiff, and the defendants were held not liable. In the second case the defendants' duty was to build a bridge which would open and let vessels pass. They employed a contractor, who built a bridge which would not open. The plaintiff was injured thereby, and the defendants were held liable for the consequences. The principle to which I am referring is further illustrated by *Pickard* v. *Smith* (3) (the coal-cellar case) and *Gray* v. *Pullen* (4), in which the Court of Exchequer Chamber, reversing the judgment of the Court of Queen's Bench, held the employer of a contractor liable for injury caused to the plaintiff by the contractor's failure to make good a pavement under which he had con-

(1) 4 Ex. 244.
(2) 6 H. & N. 488.
(3) 10 C. B. (N.S.) 470.
(4) 5 B. & S. 970.

structed a drain. Blackburn J., at the trial, and the Court of Queen's Bench, held the defendant not liable, on the ground that he was not responsible for the negligence of the contractor in doing the work. But on appeal it was held that it was the defendant's duty to fill up the drain, or to see that it was filled up, and that he was liable for the non-performance of this duty. Lord Chelmsford, in *Wilson* v. *Merry* (1), expressed some doubt as to the correctness of this decision; but I cannot find that it has ever been overruled or considered unsatisfactory by any other judge. The same principle was again applied in *Tarry* v. *Ashton* (2), in which a lamp on the defendant's property fell on the plaintiff whilst he was passing under it. So again, in *Bower* v. *Peate* (3), *Dalton* v. *Angus* (4), *Hughes* v. *Percival* (5)—in all of which cases the defendant's contractor had let down the plaintiff's wall. In each of them the defendant was held responsible, because it was his duty not to let the wall down, and to take whatever care was necessary to prevent injury to it from what he was doing. *Black* v. *Christchurch Finance Co.* (6), in the Privy Council, is the last case on the subject, and there a landowner, who had employed a contractor to burn the bush on his land, was held liable for his negligence in burning it so as to be unable to stop the spread of the fire on to the land of the plaintiff.

It is not always easy to avoid mistakes in applying this, or indeed any other, principle to difficult cases, as is shewn by *Gray* v. *Pullen* (7) and *Butler* v. *Hunter*. (8) The latter case is inconsistent with *Bower* v. *Peate* (3), but was distinctly disapproved by Lord Blackburn in *Hughes* v. *Percival*. (9) Neither is it easy to express the principle in terms which will apply to all cases, as is shewn by Lord Blackburn's criticisms (9) when referring to *Bower* v. *Peate* (3) and *Quarman* v. *Burnett* (10), the well-known job-master's case. I will take the law, however, as it was laid down by Lord Blackburn in *Dalton* v. *Angus*. (4)

(1) L. R. 1 H. L., Sc. 326, at p. 341.
(2) 1 Q. B. D. 314.
(3) 1 Q. B. D. 321.
(4) 6 App. Cas. 740, 829.
(5) 8 App. Cas. 443.
(6) [1894] A. C. 48.
(7) 5 B. & S. 970.
(8) 7 H. & N. 826.
(9) 8 App. Cas. 443, 446, 447.
(10) 6 M. & W. 499.

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Lord Blackburn there said: "Ever since *Quarman* v. *Burnett* (1) it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them. So that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (2); *Pickard* v. *Smith* (3); *Tarry* v. *Ashton*." (4) Lord Blackburn in this passage contrasts a contractor's negligence, which he calls "collateral," with failure on the part of a contractor to perform the duty of his employer. For the first the employer is not liable; for the second he is, whether the failure is attributable to negligence or not. Lord Blackburn's language in *Hughes* v. *Percival* (5) shews that this is really what he meant, for he points out that the employer's duty was to see that his contractor did his work properly. Lord Watson (6) said the same thing.

I pass now to consider the duty of the district council in the present case. Their duty in sewering the street was not performed by constructing a proper sewer. Their duty was, not only to do that, but also to take care not to break any gas-pipes which they cut under: this involved properly supporting them. This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the district council's duty for them, but did so carelessly; the case is one in which the duty of the district council, so far as the gas-pipes were concerned, was not performed at all. The

(1) 6 M. & W. 499.
(2) 6 H. & N. 488.
(3) 10 C. B. (N.S.) 470.
(4) 1 Q. B. D. 314.
(5) 8 App. Cas. at p. 446.
(6) 8 App. Cas. at p. 449.

case falls within the second of Lord Blackburn's propositions, and not within the first. It was contended for the district council that, although they might be liable to the owner of the gas-pipes, they were not liable to the plaintiff, as they were under no duty to him. But this is not consistent with *Gray* v. *Pullen* (1), nor with *Tarry* v. *Ashton* (2), in neither of which was the defendant under any duty to the plaintiff, except as one of the public. On these grounds I am of opinion that the district council are liable to the plaintiffs.

Mr. Kershaw contended that the relation between the district council and Thornton was that of master and servant. Of course, if this were so, the liability of the district council would be clear enough. But I am not prepared to decide the case on this ground. It is not proved that the inspector gave orders which led to the mischief; and, large as the inspector's powers were, Thornton was not, in my opinion, the servant of the defendants. *Reedie* v. *London and North Western Ry. Co.* (3) and *Steel* v. *South Eastern Ry. Co.* (4) support this conclusion.

With respect to the remoteness of damage, little need be said. The nature of gas, its certainty to escape, and to find its way wherever it can get, and to explode, if it escapes in large quantities and comes into contact with fire, all render the breaking of a gas-main very dangerous if houses are near. The fact, moreover, that free escape upwards through the surface of the road was greatly hindered by the hardness of the surface after it was left by the contractor would tend to force the gas laterally to some considerable distance, and very probably into some passage or place near a fire. Such an accident as that which actually happened is only what might have been reasonably expected. *Sharp* v. *Powell* (5) does not, therefore, apply to the present case. The appeal must be allowed, and judgment must be entered for the plaintiffs against the district council for 45*l.* and the costs of the action; and the district council must pay the costs of the appeal.

(1) 5 B. & S. 970.
(2) 1 Q. B. D. 314.
(3) 4 Ex. 244.
(4) 16 C. B. 550.
(5) L. R. 7 C. P. 253.

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A. L. SMITH L.J. read a judgment in which, after stating the facts as above, he continued:—In order to render a person liable for an act of negligence, which he did not himself commit, it must be shewn by the person injured, either that the person sought to be made liable authorized the act of negligence complained of, or that it was committed by his servant in the course of his employment, or that he owed such a duty to the person injured that he could not, by delegating its performance to a contractor, rid himself of the duty.

I pass by a liability which may be imposed upon an owner or occupier of land for injury to another occasioned by the user of his land, which was referred to by Parke B. in his judgment in *Rapson* v. *Cubitt*. (1) It was not contended at the bar that such a liability had any application to the present case, and indeed, if it had, it would impose a very onerous obligation upon local authorities, which, so far as I know, it has never before been attempted to impose upon them when executing works by their contractor in a public street.

In the present case, in my judgment, the relation of master and servant did not exist between the council and Thornton, but the true relation was that of principal and contractor. It is true that the district council had the right of fully superintending and supervising by their inspector the execution of the works, and giving directions in relation thereto; but *Steel* v. *South Eastern Ry. Co.* (2) and *Reedie* v. *London and North Western Ry. Co.* (3) shew that these circumstances do not of themselves render a principal liable for the negligent act of his contractor, unless it was brought about by the order of the inspector.

If the fracture of the gas-pipe in the present case had been caused by reason of the orders of the district council's inspector, that would have rendered the district council liable, because, as between the district council and the inspector, the relation of master and servant existed, and for his acts within the scope of his employment the council would be liable; but no proof was given that the fracture was occasioned by anything which

(1) 9 M. & W. 710, at p. 714. (2) 16 C. B. 550.
(3) 4 Ex. 244.

the inspector either said or did. If the inspector was guilty of any negligent omission that was a breach of a duty which he owed to his employers, not to the plaintiffs.

The plaintiffs have not shewn that the district council authorized the act of negligence complained of, nor that the contractor stood to the council in the relation of a servant. But the important question still remains, whether the plaintiffs have not shewn that the district council owed such a duty towards them that the council could not, by delegating that duty to a contractor, escape liability thereunder should the contractor be guilty of negligence in the performance of the work which he had contracted to execute.

In *Dalton* v. *Angus* (1) Lord Blackburn (2) stated the law applicable to a case like the present. [The Lord Justice referred to the passage already quoted by Lindley L.J., and continued :—]

Lord Blackburn, it will be seen, here points to two distinct cases, the one in which the cause of action is founded upon the negligence, either of the servant acting within the scope of his employment, or of a contractor, and the other in which the cause of action is founded upon a breach of a duty the performance of which a person could not escape by delegation to another. As illustrations of this duty I may refer to the class of cases of which *Hole* v. *Sittingbourne and Sheerness Ry. Co.* (3), *Pickard* v. *Smith* (4), *Tarry* v. *Ashton* (5), and *Gray* v. *Pullen* (6) are instances, in all which it was held that a duty was imposed by law upon the defendant towards the plaintiff, as one of the public, not to interfere with the right which the plaintiff possessed of using a public way in such a way as to impede or injure him when passing along it; and also to the other class of cases, which is exemplified by *Bower* v. *Peate* (7) and *Dalton* v. *Angus* (1), and in which it was held that a legal duty was imposed upon the defendant towards the plaintiff not to interfere with his right to have his land supported by that of the defendant. In each of those cases it was held that the defendant was liable to the

(1) 6 App. Cas. 740.
(2) 6 App. Cas. 829.
(3) 6 H. & N. 488.
(4) 10 C. B. (N.S.) 470.
(5) 1 Q. B. D. 314.
(6) 5 B. & S. 970.
(7) 1 Q. B. D. 321.

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plaintiff for breach of the duty thus imposed upon him, although the act or default which caused the injury was the act or default of the defendant's contractor, and not of the defendant himself.

The ratio decidendi of these cases is, that, as the duty was imposed upon the defendant by law, he could not escape liability by delegating the performance of the duty to a contractor, for the obligation was imposed upon the defendant to take the necessary precautions to ensure that the duty should be performed.

If no other legal duty were imposed upon the defendant council than that which appears in the above-mentioned cases, then, inasmuch as they have invaded no right either of transit or of support to which the plaintiffs were antecedently entitled, I should have thought that the plaintiffs would have had some difficulty in bringing the defendant council within these authorities. But this point I need not determine, for there is another duty imposed by law upon the defendant council in the circumstances of this case which, in my judgment, settles the question. Lord Watson, in *Dalton* v. *Angus* (1), states it thus: "When an employer contracts for the performance of work, which, properly conducted, can occasion no risk to his neighbour's house which he is under obligation to support, he is not liable for damage arising from the negligence of the contractor. But in cases where the work is necessarily attended with risk, he cannot free himself from liability by binding the contractor to take effectual precautions. He is bound, as in a question with the party injured, to see that the contract is performed, and is therefore liable, as well as the contractor, to repair any damage which may be done."

When the decision of the House of Lords in *Hughes* v. *Percival* (2), and the judgment of the Privy Council in *Black* v. *Christchurch Finance Co.* (3), are rightly understood, it appears to me clear that, in the circumstances of this case, a duty was imposed upon the defendant council which they could not evade by employing a contractor to do the work. The nature of this duty was thus formulated in the year 1876 by the Queen's Bench

(1) 6 App. Cas. at p. 831. (2) 8 App. Cas. 443.
(3) [1894] A. C. 48.

Division (Cockburn C.J. and Mellor and Field JJ.), in *Bower* v. *Peate*. (1) Cockburn C.J., in delivering the judgment of the Court, said (2): "The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful." It should be noted that in *Hughes* v. *Percival* (3) Lord Blackburn (4) doubted whether that duty was not too broadly stated, for he said: "If taken in the full sense of the words it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers." It is not for me to criticise this statement of Lord Blackburn, but, with all respect, I would point out that it seems to me that it is not, in the natural course of things, to be expected, when a man hires post-horses and a coachman from an innkeeper, that, unless means are adopted to prevent them, injurious consequences will arise to his neighbour. In such a case, in the ordinary course of events, no injuries would occur to any one. The coachman would drive, and the hirer would ride in the carriage, and, in the ordinary course, the transit would come to an end without injury to any one. Now the facts in *Hughes* v. *Percival* (3), as ascertained by the House of Lords, were these. The defendant had employed a contractor to take down his house, which stood between the plaintiff's house and the house of B., and to erect a new house for him upon the old site. In performing this work the contractor negligently cut

(1) 1 Q. B. D. 321.
(2) 1 Q. B. D. at p. 326.
(3) 8 App. Cas. 443.
(4) 8 App. Cas. at p. 447.

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into the party-wall between the defendant's house and the house of B., and this caused the defendant's house to fall, and thus produced the injury complained of to the plaintiff's house. The question arose, whether the defendant was liable to the plaintiff for the negligent act of his contractor. No question whether the plaintiff had any right to support from the defendant's house arose. It was held that the defendant was liable, upon the ground that the work ordered by him was necessarily attended with risk to the plaintiff's house, and that it was therefore the defendant's duty to see that proper precautions were taken to prevent injury to that house. Lord Blackburn said (1): "The question is, I think, narrowed to this: Was the operation, during which the defendant's duty required him to see that reasonable care and skill should be used, over at the time when those engaged in the work cut into the party-wall between the defendant's house and Barron's?" And Lord Watson said (2): "The appellant" (i.e. defendant) "does not deny that many of the operations which he contemplated, and which he had employed a contractor to execute, were such as would necessarily, or possibly, imperil the stability of the party-wall, if no precautions were used; nor does he dispute that it was incumbent upon him to see that these operations were safely carried out by the contractor. What he did (by his counsel) allege, and offer to prove before the jury, was, that all these hazardous operations had been brought to a safe termination months before the occurrence which resulted in damage to the respondent's house." And Lord FitzGerald said (3): "What is the law applicable? What was the defendant's duty? The law has been verging somewhat in the direction of treating parties engaged in such an operation as the defendant's as insurers of their neighbours, or warranting them against injury. It has not, however, reached quite to that point. It does declare that under such a state of circumstances it was the duty of the defendant to have used every reasonable precaution that care and skill might suggest in the execution of his works, so as to protect his neighbours from injury, and that he cannot get rid

(1) 8 App. Cas. at p. 447. (2) 8 App. Cas. at p. 449.
(3) 8 App. Cas. at p. 455.

of the responsibility thus cast upon him by transferring that duty to another." The learned Lords, finding as a fact (as indeed the majority of the Court of Appeal had found) that the hazardous operation was not over when the negligent act of the contractor had taken place, held the defendant liable for that negligent act, the defendant not having therefore performed his duty to the plaintiff.

The recent case, *Black* v. *Christchurch Finance Co.* (1), was decided upon the same principle, and is pertinent to the present case. In that case the plaintiff sued the defendants for damages, by reason of having had his crops burnt by a fire lighted upon the defendants' land by their contractor, which spread on to the plaintiff's land. It was found by the Court below, and that finding was adopted by the Privy Council, that the defendants had employed a contractor to clear some bush off their lands, partly by cutting the bush and partly by burning it, and that, pursuant to his contract, the contractor lighted a fire, which subsequently spread on to the plaintiff's land and caused the injuries complained of. The Privy Council upon these facts held the defendants liable, on the ground that the lighting of a fire on open bush-land, from which it might readily spread to adjoining property, was an operation necessarily attended with danger, and that a proprietor who executed such an operation was bound to use all reasonable precautions to prevent the fire from extending to his neighbour's property, and, if he authorized another to act for him, he was bound, not only to stipulate that such precautions should be taken, but also to see that those precautions were in fact observed, otherwise he was responsible for the consequences, and *Hughes* v. *Percival* (2) was cited in support of this proposition.

Applying the principle laid down in these cases, it appears to me that the district council in the present case owed the abovementioned duty to the plaintiff, and that they have not performed it. Digging under gas-pipes in use must necessarily be attended with risk, unless all reasonable precautions are taken to guard against it. If a gas-pipe be left unsupported it is obvious that

(1) [1894] A. C. 48. (2) 8 App. Cas. 443.

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it may become fractured, and then an escape of gas, with its attendant consequences, will necessarily result. And indeed it is obvious, from clauses 14, 45, and 46 of the contract in this case, that risk was apprehended, for those specific provisions were inserted in order to obviate the danger.

It was not attempted on behalf of the district council to prove that they had taken any precautions whatever. The sole point taken at the trial on their behalf was, that they had delegated the performance of the works to a contractor, and therefore were not liable, and upon that they asked the learned judge to enter judgment for them, and he did so.

It was argued before us that, even if the learned judge should not have done so, and the district council were liable, the damages sought to be recovered were too remote, and *Sharp* v. *Powell* (1) was referred to. In that case it was not known to the defendant's servant (and I apprehend the Court concluded that it could not be taken that he ought to have known) that the water which he was using for washing a van in a street would not, in the usual way, run down a grating which was placed there for that purpose, and so escape, whereas in fact, by reason of a severe frost, the grating had become blocked with ice, and the water overflowed, and thereby the plaintiff's horse slipped and was injured.

If in the present case it was not in the ordinary course of things that, if a gas-pipe was broken and the gas was allowed to escape beneath a battered-down surface, it would percolate wherever it could, and would escape upwards upon the first opportunity, the case cited might have some application. But, in my opinion, the explosion which took place was the direct consequence of the act of negligence complained of, and occurred in the ordinary course of events attendant thereon, as would be known to any one of intelligence who cared to think about the matter.

For the reasons which I have given, the district council are, in my judgment, liable, and the learned judge should not have entered judgment for them.

The appeal must be allowed, and judgment must be entered

(1) L. R. 7 C. P. 253.

for the plaintiffs against the defendant council, with costs here and below.

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RIGBY L.J. read the following judgment:—In my judgment, the district council are liable to the plaintiffs in this action.

I mention, in order to dispose of it at once, the objection that the damages claimed are too remote. The cause of damage was an explosion of gas, which escaped from a main broken by the negligence of the defendant Thornton, whilst excavating or filling up a sewer. The gas found its way into the house occupied by the plaintiffs, and was there ignited. As regards remoteness, the case would have been the same if the gas company had negligently caused the escape. In my opinion, the explosion in the plaintiffs' house was the natural and probable result of the negligence. Gas will find its way by the line of least resistance, and in this case it was prevented by the ramming down of the earth above from escaping into the open air. It could not have been predicted where it would go without examination of the surrounding soil, but that it might find its way to some place where, being mixed with atmospheric air, it would be in great risk of being exploded, so as to do damage to person or property, was not only possible, but in a high degree probable, and quite natural. That place happened to be the plaintiffs' house, and the damage which resulted was, in my judgment, not too remote.

Apart from the question of remoteness, the main defence set up on the appeal was, that the defendant Thornton was an independent contractor, for whose negligence the district council were not liable. I will assume in the first instance that he was an independent contractor. His interference with the street would have been illegal, but for the fact that he was acting as the agent and delegate of the district council, who, having power to do the work under sect. 150 of the Public Health Act, 1875, and other statutory provisions, employed Thornton to do it for them, so that he acted by virtue of their authority, and their authority only. If they had done the work by the hands of their servants, it cannot be doubted that it would have been

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their duty to use all reasonable skill and care to prevent damage to any persons arising from their operations. The plaintiffs were, as the event proved, within the range of those operations, and not too remotely connected with them, and the duty would have been owed by the council to them, among others.

Notwithstanding a great conflict of judicial opinion, many dicta, and some decisions to the contrary, I consider it has always been, on the balance of authority, and is now clearly, recognised as the law, that no one can get rid of such a duty by imposing it upon an independent contractor. As authorities for this, it is sufficient to refer to the passage from the opinion of Lord Blackburn in *Dalton* v. *Angus* (1), which has been already quoted by Lindley L.J., the cases therein mentioned, and, as approaching more nearly in its facts to the present case, and in principle not to be distinguished from it, *Gray* v. *Pullen*. (2)

The true distinction between cases of master and servant and cases of employer and independent contractor seems to be this, that, when the person actually doing the work does something for which he would himself be liable, the master is, whilst the employer is not, liable for what is conveniently called "collateral negligence," meaning thereby negligence other than the imperfect or improper performance of the work which the contractor is employed to do. Here the contract in express terms imposed upon the contractor the duty of taking proper precautions against injury to any gas-pipe which he might fall in with in the course of the excavation—the very duty (among others) which the law would have thrown upon the district council if they had been acting by the hands of their servants. I am, however, satisfied that, under the contract in this case, Thornton and his workpeople were, for the purposes of the rule of law which imposes liability for the negligence of servants on a master, in the position of servants of the district council. Under clauses 7 and 8 of the contract, as I read them, Thornton, his foremen and workmen, are bound to defer to the instructions and opinion of the council's inspector, and to obey his orders in every particular. Under clause 11 the inspector has power

(1) 6 App. Cas. at p. 829. (2) 5 B. & S. 970.

to stop the works, or any part thereof, absolutely at any stage, and to enlarge, diminish, modify, alter or vary the works, or any part thereof, without invalidating the contract. Clause 14 provides expressly that the contractor shall, as between himself and the district council, be responsible for any neglect or carelessness, in terms apparently sufficient to cover any breach of duty which would be imposed by law on the district council, including particularly the protection of any gas-pipes laid bare, or otherwise interfered with; but this would not affect the nature of the relation between the parties. Independently of the wide general provisions before referred to, it is made plain, by clauses 45 and 46, with regard to gas and water pipes, that the inspector is to have full control over the means adopted for their protection.

In fact, I have not been able to discover any single particular in which the contractor can act with greater freedom or independence than a hired servant could do. It is this unlimited right of control, whether actually exercised or not, which, in my opinion, is the condition for inferring the responsibility of a master.

The case is manifestly widely different from *Reedie* v. *London and North Western Ry. Co.* (1), in which a power of superintendence only was reserved, coupled with a power to dismiss any workman, not for disobedience to orders, but for incompetence only—a power analogous to that of rejecting improper materials during the progress of works, and not depriving the contractor of his right to do the work according to his own initiative, so long as he does it in accordance with his contract. It is distinguishable also from *Steel* v. *South Eastern Ry. Co.* (2), where the contract was not produced, but the foreman of the contractor (speaking of Mr. Phillips, the company's surveyor) said, "Mr. Phillips was the person who told me what to do. But I was the responsible person to determine in what manner that which Mr. Phillips directed me to do should be carried out." The damage in that case was caused by negligence in doing work, which was not only not ordered, but was positively forbidden to be done.

(1) 4 Ex. 244.

(2) 16 C. B. 550.

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On these grounds I am of opinion that the appeal should be allowed, and judgment be entered for the plaintiffs against the district council, according to the verdict of the jury.

Appeal allowed.

Solicitors: *Jaques & Co., for Samuel Wright & Co., Bradford; Flower, Nussey & Fellowes, for Killick, Hutton & Vint, Bradford.*

W. L. C.

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[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* LORD SUDELEY AND OTHERS.

Revenue—Probate Duty—Foreign Mortgage—Local Situation of Asset.

A testator died domiciled in England. By his will, after bequeathing various specific legacies, he devised and bequeathed one-fourth of the residue of his real and personal estate to his wife. His will was proved in England; and while his estate was being administered there, and before the amount of the clear residue had been ascertained, the wife died. The husband's estate included money invested on mortgages of real property in New Zealand. These mortgages remained unrealized at the date of the wife's death, and no part of them had been appropriated to any particular shares of the ultimate residue. The executors of the wife, in their affidavit made for the purpose of obtaining probate of her will, did not include her fourth share of the mortgage securities, and refused to do so, claiming that it was not liable to probate duty in this country:—

Held, by Lopes and Kay L.JJ. (Lord Esher M.R. dissenting), reversing the judgment of the Queen's Bench Division, that the right of the executors of the wife not being to a share of the mortgage securities, but being a right as against the executors of the husband to have the estate administered, and to receive from them a fourth part of the residue, was an asset of the wife's estate, that its locality was English, and that its value was therefore subject to probate duty.

APPEAL by the Attorney-General against the judgment of the Queen's Bench Division in favour of the defendants, reported [1895] 2 Q. B. 526.

Information by the Attorney-General against the executors of Frances Louisa Tollemache, deceased, claiming that a sum of money, part of her personal estate, was liable to probate duty.

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Algernon Gray Tollemache, the husband of Frances, by his will and codicils thereto, after bequeathing various specific legacies, devised and bequeathed the residue of his real and personal estate to trustees and executors upon trust (in the events which happened) to pay the income thereof to his wife for her life, and as to one-fourth of the residue he gave the same to her absolutely. The testator died domiciled in England and his will was duly proved. At the time of his death he was possessed of personal estate which included large sums invested on mortgages of real estate in New Zealand. While the estate under his will was in course of being administered and before the amount of the clear residue had been ascertained, Frances Louisa Tollemache died, having by her will appointed the defendants her executors, who duly proved the will in England. At the date of her death the New Zealand mortgage securities remained unrealized, and no portion of them had been appropriated to any particular shares of the ultimate residue. In the affidavit made for the purpose of obtaining probate of her will, the defendants included her fourth share of the personal estate of her deceased husband, exclusive of the New Zealand mortgages, but they did not include, and claimed to exclude, in computing the value of such fourth share, the whole of such mortgage securities.

The estimated net value of the mortgage securities at the time of her death was 447,403*l.* 2*s.* 5*d.*, her fourth share of which was 111,850*l.* 15*s.* 7*d.* The Crown claimed that this sum ought to be included as part of her estate liable to probate duty.

The Divisional Court (Lord Russell of Killowen C.J. and Charles J.) gave judgment in favour of the defendants. (1)

The Attorney-General appealed.

1895. Dec. 4. *Sir R. E. Webster, A.-G.*, and *Sir R. B. Finlay, S.-G.* (*Vaughan Hawkins* with them), for the Crown. The contention of the Crown is that the asset of Frances' estate was in truth a claim by her executors against the executors of A. G. Tollemache. This claim could be satisfied out of any

(1) [1895] 2 Q. B. 526.

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part of the estate in their hands, and there was no duty on them to satisfy it out of any particular asset. Unless there was an appropriation of the foreign mortgages in the lifetime of Frances, and with her consent, to meet her claim, that claim is an English asset of her estate. Her executors are not entitled to any part of the mortgages in specie; they cannot sue the mortgagors; their only right is to call on the executors of A. G. Tollemache to realize the estate of their testator, and to pay over the amount due under the bequest to Frances. The husband's executors have obtained for themselves a legal title to the mortgages, in order that they may, when the proper time arrives, realize the estate, and not in any sense as trustees of that property for Frances. The local situation of the asset of Frances' estate is in England, and probate duty is chargeable on its ascertained value.

The decision of Sir J. Hannen in *In the Goods of Ewing* (1) is in point, and that case was cited by Lord Herschell in *Laidlay* v. *Lord Advocate* (2) on the question of the locality of an asset.

[They referred also to *Attorney-General* v. *Hubbuck* (3); *Attorney-General* v. *Brunning* (4); *Attorney-General* v. *Marquis of Ailesbury* (5); *Attorney-General* v. *Higgins*. (6)]

Channell, Q.C., and *Bremner*, for the defendants. To find if probate duty is payable the local situation of the asset must be determined. A debt is locally situated where the debtor is, and administration is drawn to that place: *Yeoman* v. *Bradshaw* (7); *Walsh* v. *Reg.* (8) The debts in the present case are local in New Zealand. The right of the executors of Frances is not a mere personal right against the executors of A. G. Tollemache, but is to have the estate realized and her share handed over to them, and the proceedings to do this must take place in New Zealand. The question to be determined is the situation of the asset at the time of the death of the person whose estate it is sought to charge, and nothing that happens

(1) 6 P. D. 19.
(2) 15 App. Cas. 468, at p. 483.
(3) 13 Q. B. D. 275.
(4) 8 H. L. C. 243.
(5) 12 App. Cas. 672.
(6) 2 H. & N. 339.
(7) Holt, 42.
(8) [1894] A. C. 144.

afterwards can affect the question whether probate duty is payable.

[They referred to *Attorney-General* v. *Dimond*. (1)]

Sir R. B. Finlay, S.-G., in reply.

Cur. adv. vult.

1896. Feb. 26. The following judgments were read :—

LORD ESHER M.R. This was the case of an information by the Attorney-General against the defendants, the executors of the will of Mrs. Louisa Tollemache, in respect of their refusal to bring before the Commissioners of Inland Revenue a corrective affidavit required from them by the commissioners. The information alleges that Algernon Gray Tollemache, the husband of Mrs. Frances Louisa Tollemache, died on January 16, 1892, leaving to his wife one-fourth of his residuary estate absolutely, and that the said A. G. Tollemache was at the time of his death possessed of personal estate exceeding in estimated value 1,250,000*l.*; and that the personal estate included large sums amounting in the whole to upwards of 400,000*l.* invested on mortgages of real estate in New Zealand. The information then alleged that Frances Louisa Tollemache died on April 15, 1893, having by her will appointed the defendants her executors, and bequeathed her residuary personal estate to them upon trust for sale and conversion, and that the defendants proved her will in the Probate Division of the High Court. In the affidavit made by the defendants, for the purpose of obtaining probate, they specified the estimated value of the estate and effects of their testatrix, for and in respect of which the probate was to be granted, at a certain sum. The defendants included as part of the estate of their testatrix one-fourth share of the estate of A. G. Tollemache given to her by his will, exclusive of the New Zealand mortgages; but they did not include, and they claim to exclude in estimating the value of such one-fourth share, the whole of the New Zealand mortgage securities. The information stated that the residuary estate of A. G. Tollemache had not been distributed at the time of the

(1) 1 C. & J. 356.

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death of Frances Louisa Tollemache, and that no part of the New Zealand mortgages had been transferred specifically to the defendants. The information then alleged that the executors of A. G. Tollemache afterwards brought in a residuary account of the estate of A. G. Tollemache, from which it appeared that the net value of the New Zealand mortgage securities was 447,403*l.* 2*s.* 5*d.*; and the Commissioners of Inland Revenue had accordingly required the defendants, as executors of Frances Louisa Tollemache, to bring in a corrective affidavit and to include the sum of 111,850*l.* 15*s.* 7*d.* (being one-fourth of 447,403*l.* 2*s.* 5*d.*) as part of the estate and effects liable to probate duty of the said Frances Louisa Tollemache; but the defendants refused to do so. The prayer of the information is that it may be declared that the sum of 111,850*l.* 15*s.* 7*d.* (being one-fourth of 447,403*l.* 2*s.* 5*d.*, the value of the mortgage securities in New Zealand forming part of the residuary personal estate of the said A. G. Tollemache) ought to have been included in the value, for the purposes of probate duty, of the personal estate of the said Frances Louisa Tollemache, and that the said sum was and is liable to duty, and that the defendants may be ordered to pay the amount of such duty with interest to the Commissioners of Inland Revenue.

The answer of the defendants did not vary the facts stated in the information. What the information claimed was that 111,850*l.* 15*s.* 7*d.* ought to have been included, not that the value of a right of action should be included. The case was heard before the Lord Chief Justice of England and Charles J. It was contended before them, and before us on behalf of the Crown, that the only right of the defendants as to the New Zealand mortgages is a right, as against the executors of Algernon Gray Tollemache, to have his estate administered, and that such right is an asset of the estate of Frances Louisa Tollemache, and is an English asset. It was contended for the defendants that the right of action is not an asset at all of the estate of Frances Louisa Tollemache; that an asset of her estate was her share of New Zealand mortgage debts, but that such debts were payable in New Zealand, and the payment of them could be enforced only in New Zealand; that therefore

they were, and her share in them was, a foreign asset, and therefore not liable to probate duty here.

The first question seems to be what in this case is the asset which can be brought within the purview of the statutes as to probate duties. The question is not what in some courts, or under some jurisdictions, is called, and properly called, an asset, but what is in this case the asset within the statutes relating to probate duties.

It is to be observed that the word "asset" is not used in s. 38 or s. 41, or in the schedule part the third of 55 Geo. 3, c. 184. What is to be brought into the affidavit by s. 38, and is to be subjected to duty is, according to the terms used in the statute, the value of "the estate and effects of the deceased"; and the duty to be paid is a sum of money regulated by the money value of the estate and effects. The words "estate and effects" are, according to the decisions, to be limited to personal estate and effects. The value in money of anything which is called personal estate in English law is the money amount for which it can or could be sold on a fair sale. This description can be applied to a share of New Zealand mortgage debts. It cannot be applied to the suggested right of action. A lawsuit may be a suit in equity, or an action at law. In either case the question to be determined by it is—what were the rights of the parties before the suit or action was commenced? The lawsuit does not create the right; it determines authoritatively that there was, before it began, a right, and it determines what that right was and is. What is called a "right of action" is not the power of bringing an action. Anybody can bring an action, though he has no right at all. The meaning of the phrase is, that the person has a right or claim before the action which is determined by the action to be a valid right or claim. The action or suit does not confer a right which did not exist before it; it only declares that a right did exist before it. An action or suit is therefore mere procedure. An action with regard to a will is no part of the estate of the testator: it is a procedure, or a means of determining authoritatively what was or was not a part of his estate—what was or was not an asset of his estate. In this case, therefore, the right of action by her executors

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against the executors of A. G. Tollemache was no part of the estate of Frances Louisa Tollemache; but her right to a share of the New Zealand mortgage debts was a part or asset of her estate.

The next question then is—was that right an asset of her estate liable to pay probate duty, and ought the value of it therefore to have been disclosed in the affidavit under s. 38 of the Act of Geo. 3 or in the further affidavit under s. 32 of 44 & 45 Vict. c. 12? The personal estate of a person must almost always consist of different parts. The affidavit made under s. 38, in practice in specifying what is the value of the estate, sets out the different items or parts of which it consists; and each of these items or parts is called an asset of, i.e., a part of, the whole estate in respect of which probate duty is to be paid. Now, it is not every asset of the estate that is to be valued for duty, but only such of the assets of the estate as were at the date of the death of the testator locally within the jurisdiction of the authority which grants the probate. This authority was formerly the Ordinary, and is now the Court of Probate. The distinction between assets of the estate which are liable to probate duty, and assets of the estate which are not liable to probate duty, though both are assets of the estate, is laid down, and the reasons are given for it in 1831 by Lord Lyndhurst C.B. in *Attorney-General* v. *Dimond*. (1) The distinction depends upon the locality of the asset at the time of the testator's death. If the locality is outside the jurisdiction, the asset is called a foreign asset, and is not liable. Where the asset is a specific tangible article there can be no difficulty in determining its locality. Where the asset is not a specific article, but what is called a chose in action, rules have been laid down to determine its locality. As to debts due to the testator at the time of his death, the rule to be deduced from the cases is that if the debtor is, at the date of the death of the testator, abroad, and the debt is payable only abroad, and could only be got from him abroad, either by some act to be done there or some proceeding taken there, the debt is a foreign asset; but if, although the debtor is abroad, a legal proceeding

(1) 1 C. & J. 356.

could be taken here, which would, in law, directly order and enforce the payment here of the debt, then the debt is an asset here liable to the probate duty. Thus, in *Attorney-General* v. *Dimond* (1), the testator was a creditor of the French Government for 32,727 francs of Rentes at 5 per cent. Those were only payable by the French Government, the debtor, in France, and payment could only be obtained by some act done in France. It was for that reason held that the debt, the asset, was not such an asset as was liable to pay probate duty in England. So in *Attorney-General* v. *Hope* (2), in 1834, it was held in the House of Lords that goods in America at the date of the death of the testator, sent there by the testator for sale by his agents, and debts, both simple and contract debts, due to him in America, and money in American funds, were not liable to probate duty here, although all would eventually come to the hands of the executors here. So in *Pearse* v. *Pearse* (3), in 1838, by Shadwell V.-C., notes of the Government of India, payable in India, were held not liable because they were payable only in India. In *Attorney-General* v. *Bouwens* (4) Dutch bonds due to the testatrix were held liable, but it was because they were transferable by delivery in England.

The case of *Attorney-General* v. *Higgins* (5) is really to the same effect. The head office of the railway company was in Scotland. The shares were, therefore, payable in Scotland. It was held that the executor ought to have exhibited an inventory in Scotland.

In the present case the mortgage debt was payable by the mortgagor in New Zealand; the debtor was, at the time of the death of the testatrix Frances Louisa Tollemache, in New Zealand. No action could be brought in England by the defendants directly against the New Zealand mortgagor to order and recover payment of the mortgage debt. The action by the defendants against the executors of A. G. Tollemache would not obtain the mortgage debts; it would oblige the executors of A. G. Tollemache to bring another action in New Zealand against the New Zealand mortgagors. Therefore,

(1) 1 C. & J. 356.
(2) 2 Cl. & Fin. 84.
(3) 9 Sim. 430.
(4) 4 M. & W. 171.
(5) 2 H. & N. 339.

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within the authority of all the cases, the New Zealand mortgage debts, and the one-fourth share of them in which Frances Louisa Tollemache was interested, were a foreign asset, which was properly omitted by the defendants from their affidavit; unless a different decision is to be the result, in this Court, from a consideration of the case before Lord Hannen—*In the Goods of Ewing* (1)—in 1881. I cannot think that case affords an authority upon any question in this case. It was an application by a legatee under the will of William Ewing to the Court of Probate to appoint an administrator of the will in England, although the executors of the will were duly administering the will which had been proved in Scotland. The Crown was no party to the application, and was not before the Court. No question of probate duty arose or could arise at that stage. What was said by Lord Hannen may be authority for saying that the right of Frances Louisa Tollemache to a fourth share of the residue of A. G. Tollemache's estate, including the New Zealand mortgage debts, is an asset of the estate of Frances Louisa Tollemache. That is not denied. But nothing said by Lord Hannen goes to shew that it is not a foreign asset. If it does shew that, it is contrary to all other authorities. Certainly nothing is said in that case to shew that Lord Hannen thought that an action or suit could be an asset of an estate. The claim of the Attorney-General is in form right, namely, that the value of the mortgage debt, not the value of the cause of action, should have been included; but that claim, so rightly stated, cannot be sustained.

I agree with the Lord Chief Justice and Charles J., and am of opinion that the appeal should be dismissed.

LOPES L.J. The executors of Frances Louisa Tollemache are entitled to a fourth part of the residuary estate of her husband Algernon Tollemache. A sum of 111,850*l.* 15*s.* 7*d.*, part of such residuary estate, is the value of the one-fourth part of certain mortgages in New Zealand. The Crown claims probate duty on this sum. The executors resist the claim, on the ground that the 111,850*l.* 15*s.* 7*d.* is a foreign and not an English asset, and therefore not subject to probate duty.

(1) 6 P. D. 19.

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The question is whether such sum is a foreign or English asset. I have come to the conclusion that it is an English asset, for the reasons which I will shortly give.

The material facts are as follows: Algernon Gray Tollemache by his will, after bequeathing various specific legacies, devised and bequeathed the residue of his real and personal estate to trustees to pay the income thereof in the events that have happened to his wife Frances Louisa for her life, and by a codicil he gave one-fourth of the entire residue to his wife absolutely. The husband died domiciled in England, and his will was duly proved in England. At the time of his death he was possessed of personal estate, including large sums invested on mortgage of real estate in New Zealand. While the estate under the will was in course of administration, and before the amount of the clear residue was ascertained, his wife Frances died, having by her will appointed the defendants her executors, who duly proved her will in England. At the date of her death the New Zealand mortgage securities remained unrealized, and no portion of them had been appropriated to any particular share of the ultimate residue.

It is to be observed that neither Frances nor her executors could claim any part of this estate in specie: the executors of her husband were not trustees of the estate for her—all she was entitled to was her proportion of the proceeds of her husband's estate after realization. Neither Frances nor her executors had any claim against the mortgagees to recover the mortgage debt or any portion of it; that was a claim enforceable only by the executors of Algernon. The right of the executors of Frances as against the executors of her husband is a right to have his estate administered. Administered where? The husband was domiciled in England, his will was proved in England, his executors are in England, and his estate is being administered in England, and the money recoverable will be brought to England. The executors of the husband can only be sued in the English Courts by the executors of Frances. It is an English chose in action, recoverable in England, and is, in my opinion, an English and not a foreign asset, and as such is subject to probate duty here.

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In the Goods of Ewing (1) is in point—a case which I think is rightly decided. The appeal should, therefore, in my opinion, be allowed.

KAY L.J. I have arrived at the same opinion as that expressed by Lopes L.J. In this information the Crown claims probate duty on the estate of Frances Louisa Tollemache, who died in 1893. Her executors resist the claim as to 111,850*l.* 15*s.* 7*d.*, part of such estate, on the ground that this sum is the value of one-fourth share of certain mortgages in New Zealand. It is alleged that Frances was entitled at the time of her death to one-fourth share of these mortgages. They were not vested in her. They were the property of her deceased husband, Algernon Gray Tollemache, who died in 1892, having by will given the income of his real and personal estate to her and his two sisters, who both predeceased him, and to the survivors and survivor of them during their lives, and subject thereto one-fourth of his residuary personal estate to her absolutely. The other three-fourths were divided by his will among a number of other persons. The testator empowered his executors to leave his residuary personal estate invested as they should find it at the time of his death, unless they thought proper to change any investments. The executors of Algernon retained the New Zealand mortgages, and obtained a transfer of them into their own names. But the residue was not divided during the life of Frances, who in the events that happened was tenant for life of the whole estate.

It is evident from this short statement that the New Zealand mortgages were not assets of Frances, nor was any part of them. Neither she nor her executors could claim any part of them in specie. They could not sue the mortgagees to recover the mortgage moneys. These mortgages were in fact outstanding assets of Algernon. The only right of Frances' executors was to call upon Algernon's executors to realize his estate, get in his outstanding assets, convert them into money, and, when the time for division arrives, divide such proceeds among the residuary legatees of Algernon. The executors of Frances

(1) 6 P. D. 19.

could not compel Algernon's executors to transfer to them any of the New Zealand mortgages in respect of her one-fourth share of residue. That could only be done if these mortgages happened to remain unconverted when all debts and legacies were paid; and the residue became divisible, and all the residuary legatees agreed that the mortgages should remain unconverted.

What, in law, is the interest of Frances' executors in the estate of Algernon? It is a right to recover from Algernon's executors one-fourth of the clear residue of his estate. So far as such residue consists of personal property, that is a chose in action. What is its locality? Algernon was domiciled in England; his will was proved here; his executors are in this country. They can only be sued by Frances' executors in the English Court. It is, therefore, an English chose in action. If this be so, it seems to me that upon such an asset probate duty is payable. If Algernon had outstanding assets in many parts of the world I do not see how that would make any difference. The one-fourth share of his residuary estate which belonged to Frances would still be an English asset, because neither she nor her executors would have any right to any of such investments in specie.

It is suggested that Algernon's executors were trustees of one-fourth share of these mortgages for Frances' executors, and that, therefore, the case is the same as though Frances had invested her own money in mortgages in New Zealand in the names of trustees for herself. But the difference is that in that case she could have compelled the trustees to transfer such mortgages to herself. That seems to me the distinction between the supposed case and the present; and, in my opinion, the distinction makes an essential difference. In strictness, Frances' executors are only entitled to receive her one-fourth share of Algernon's estate in English money. I cannot see how this can escape probate duty.

In the case of *In the Goods of Ewing* (1) John Orr Ewing died in April, 1878. He was domiciled in Scotland, and was entitled to a share in a Scottish partnership, which share was valued at 400,000*l.*, and was payable to his estate by ten annual

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instalments. By his will he gave certain annuities and, subject to them, a legacy of one-sixth of 60,000*l.* to his nephew William Ewing, and he also gave to him one-sixth of his residuary estate. His will was proved in Scotland. Part of his assets at the time of his death were in England. William Ewing died in December, 1878, before he had received his share of John Orr Ewing's estate or legacy to him. William Ewing was domiciled in Scotland, and his will was proved there by his executors. A legatee under William Ewing's will cited his executors to accept or to refuse probate of his will in England, or to shew cause why administration with the will annexed should not be granted in England to such legatee. William had no assets in England except of trifling value. The ground of the application was, in the words of Sir James Hannen, "that the claim of the estate of William Ewing on the estate of his uncle John Orr Ewing is an asset of W. Ewing's estate in England, by reason of some of the assets of the uncle's estate having been in England at the time of the death of W. Ewing."

That is the precise point raised in this case. The exemption from duty is claimed here on the ground that, the New Zealand mortgages being in existence at the death of Frances, the claim of her executors on the estate of Algernon is to that extent an asset in New Zealand. Sir James Hannen rejected this contention. I cannot assent to the argument that what he said was obiter. It seems to me to be the ground of his decision. These are his words: "The claim of the executors of W. Ewing in respect of the interest of their testator under his uncle's will, is a claim on the executors of the uncle duly to administer his estate and to pay the legacy to W. Ewing out of the funds which may be applicable to that purpose. It cannot be disputed that this claim or interest in the estate of the uncle constitutes an asset of the estate of the deceased W. Ewing, because it is recoverable by the executors of W. Ewing virtute officii; but it appears to me that it is an asset in Scotland and not in England. . . . The fact that some of the assets of J. O. Ewing were situate in England does not appear to make any difference. If I were to constitute the applicant administrator with the will annexed of W. Ewing he could not in that character take

possession of or recover the outstanding assets of the uncle's estate, he could not claim those assets themselves virtute officii, his only remedy would still be through and by means of his claim upon the executors of the uncle to have his estate duly administered." On those grounds Sir J. Hannen refused the application. The decision, or the reasons for it, are not binding on this Court if we disagreed with them; but I must say that I entirely agree with the reasons and decision.

This case was referred to in *Laidlay* v. *Lord Advocate*. (1) A domiciled Scotsman was partner in a firm for working indigo and silk concerns in India. Probate was claimed on his share. There were sixteen partners, all of whom except two were resident in the United Kingdom. It was held that the seat of the business was in India, and that this must be treated as the locality of the testator's interest in the firm, and, consequently, that this interest was exempt from probate duty in England. *In the Goods of Ewing* (2) was only referred to for a dictum of Sir J. Hannen to the effect that the locality of the share of a deceased partner must be the place where the business was carried on; but no doubt was cast upon the decision in *In the Goods of Ewing*. (2)

I am compelled, with deference to the Court below, to differ from their decision. I think the New Zealand mortgages were not an asset of Frances' estate. Her executors have no right virtute officii to any part of such mortgages. Their only right in respect of them is to call upon the English executors of Algernon to get in his residuary personal estate, convert, and divide when the time for division arrives. That right is, in my opinion, an asset of Frances' estate whose locality is English, and its value, as in the case of all English assets, is subject to probate duty in England. I think that the appeal should be allowed.

Appeal allowed.

Solicitor for Crown: *Solicitor of Inland Revenue.*
Solicitor for defendants: *J. A. Bertram.*

(1) 15 App. Cas. 468. (2) 6 P. D. 19.

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Feb. 21.

[IN THE COURT OF APPEAL.]

Ex parte CAUCASIAN TRADING CORPORATION, LIMITED.
In re A BANKRUPTCY PETITION.

Bankruptcy, Act of—Award—Execution—Seizure and Sale of Goods—"Civil Proceeding in the High Court"—Bankruptcy Act, 1890 (53 & 54 *Vict. c.* 71), *s.* 1—*Arbitration Act*, 1889 (52 & 53 *Vict. c.* 49), *s.* 12.

An application to enforce an award in the same manner as a judgment or order to the same effect under s. 12 of the Arbitration Act, 1889, is a "civil proceeding in the High Court" within the meaning of s. 1 of the Bankruptcy Act, 1890.

APPEAL from the order of a registrar in bankruptcy dismissing a bankruptcy petition.

The act of bankruptcy alleged in the petition was the seizure and sale of the debtor's goods under process in a civil proceeding in the High Court. See Bankruptcy Act, 1890, s. 1. (1)

The facts were as follows. There had been a submission to arbitration of certain matters in dispute between the petitioning creditors, the Caucasian Trading Corporation, Limited, on the one hand, and the debtor and two other persons who had carried on business in partnership with him on the other hand; and the result of the arbitration was that an award was made directing the payment of a certain sum of money by the partnership to the petitioning creditors. Upon an application by summons at chambers an order was made under the Arbitration Act, 1889, s. 12, giving leave to the petitioning creditors to enforce the award in the same manner as a judgment or order to the same effect. Upon a further application at chambers in the same matter an order was made giving leave to the petitioning creditors to issue execution for the amount due on the award against the debtor and his former partners individually.

(1) The Bankruptcy Act, 1890, s. 1, provides that "A debtor commits an act of bankruptcy if execution against him has been levied by seizure of his goods under process in an action in any court, or in any civil proceeding in the High Court, and the goods have been either sold or held by the sheriff for twenty-one days."

A writ of fi. fa. was accordingly issued against the debtor. It was alleged by the petitioning creditors that there had been a seizure and sale of his goods under that writ, which constituted an act of bankruptcy under the Bankruptcy Act, 1890, s. 1. It was contended for the debtor that the writ had not been issued "in a civil proceeding in the High Court" within the section, and therefore there could be no act of bankruptcy as alleged. The registrar decided in favour of that contention, and therefore dismissed the petition. (1)

Herbert Reed, Q.C., and *Æneas Mackintosh*, for the petitioning creditors. The writ of fi. fa. in this case was process issued in a civil proceeding in the High Court. It may be admitted that the arbitration was not a proceeding in the High Court; but the application for the purpose of enforcing the award under the Arbitration Act, 1889, s. 12, by the aid of the Court clearly was such a proceeding. It is a proceeding commenced by an "originating summons": see Order LIV., r. 4 F (3), and Order LXXI., r. 1 A. There cannot be process without some proceeding in court—either an action, cause, or matter. By the Judicature Act, 1873, s. 100, "matter" includes every proceeding in the court not in a cause. The application for the aid of the Court to enforce the award comes within that definition.

[They cited *In re Shaw and Ronaldson.* (2)]

C. Herbert Smith, for the debtor. It has been held that the provisions of the Bankruptcy Acts must be construed strictly in favour of the debtor: *In re North, Ex parte Hasluck.* (3) There was no civil proceeding in the High Court in this case within the meaning of the Bankruptcy Act, 1890, s. 1. The proceeding contemplated by that section is one ejusdem generis with an action—a proceeding which, though not technically speaking an action, is substantially analogous to one. It was

(1) It was denied that there had been an act of bankruptcy upon other grounds, but the registrar only decided the case upon the point above mentioned, leaving all other points open. Therefore the result of the judgment of the Court of Appeal, reversing the decision of the registrar as after mentioned, was that the petition was sent back to the registrar for further hearing.

(2) [1892] 1 Q. B. 91.

(3) [1895] 2 Q. B. 264.

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held in *In re Shaw and Ronaldson* (1) that proceedings in an arbitration do not become a matter in court, because the Arbitration Act, 1889, s. 1, enacts that the submission shall have the same effect as if it had been made an order of court. The whole of the proceedings in this case must be looked upon as proceedings in the arbitration, which is not a proceeding in the High Court. The provision of s. 12 of the Arbitration Act, 1889, is a substitute for the old procedure under which the submission was made a rule of court and the award then enforced by execution. The process for enforcing the award so given is merely in continuance of the proceedings in the arbitration, and is not analogous to an action. [He also cited *In re Binstead, Ex parte Dale* (2); *Farmer* v. *Mottram* (3); *Newton* v. *Boodle.* (4)]

Herbert Reed, Q.C., in reply.

Lord Esher M.R. This case depends upon the construction of s. 1 of the Bankruptcy Act, 1890. It must be assumed for the purposes of this appeal that goods of the debtor have been seized and sold under a writ of fi. fa., which is undoubtedly process of the High Court. The question is whether that process can be said to have been issued in a "civil proceeding in the High Court" within the meaning of the section. It was issued as the result of an application made to the Court by summons for leave to enforce an award as a judgment or order to the same effect. It seems to me clear that, unless the words "civil proceeding in the High Court" in the section are to receive some meaning other than their ordinary meaning, that application by summons was such a proceeding, and therefore the writ of fi. fa. was process in a civil proceeding in the High Court. But it has been urged that the words must be construed as meaning some civil proceeding of the same nature as an action in conformity with the rule of construction to the effect that, where general words in an Act of Parliament follow particular words, their meaning must be confined to matters of the same sort as those indicated by the particular words. That

(1) [1892] 1 Q. B. 91.
(2) [1893] 1 Q. B. 199.
(3) 1 D. & L. 781.
(4) 18 L. J. (C.P.) 73.

rule appears to me to be wholly inapplicable to the present case. In this section there are really two separate enactments, one relating to process in an action in any court, the other to process in any civil proceeding in the High Court. In such a case the rule of construction relied upon is inapplicable, and each of the two enactments must be construed according to the ordinary meaning of the words used. For these reasons I think that the decision of the registrar was wrong, and that this appeal must be allowed.

Lopes L.J. I am of the same opinion. Formerly the means of enforcing an award were troublesome and expensive. It was necessary to move for a rule nisi, which had afterwards to be made absolute, or to bring an action upon the award. The Arbitration Act, 1889, provides a simpler and more expeditious remedy. Under s. 12 of that Act the party desiring to enforce an award may now take out a summons, which I think may be properly called an originating summons—though what it is called is not very material—asking for the leave of the Court to enforce the award in the same manner as a judgment or order to the same effect. In the present case that course was pursued, and, the leave applied for having been granted, a writ of fi. fa. was issued. It may be assumed, for the purposes of the present appeal, that there was a seizure and sale of goods under the writ. It is, however, argued for the debtor that the writ was not issued "in a civil proceeding in the High Court" within the meaning of s. 1 of the Bankruptcy Act, 1890. I think the expression "civil proceeding in the High Court," as used in that section, must be taken to include everything which, according to the ordinary meaning of the words, can properly be called such a proceeding. It is clear that an award cannot be enforced unless recourse is had to the Court in some way; and I fail to perceive any reason for saying that an application by summons to enforce an award under the Arbitration Act, 1889, is not a civil proceeding in the High Court.

Rigby L.J. I agree. It has been argued that the application to enforce the award must be considered as a mere continuation of the arbitration, and, though in one sense a

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civil proceeding in the High Court, it was not such a proceeding within the meaning of the section. I do not think that contention can be sustained. The application for leave to enforce the award is not a matter which takes place in the arbitration. It is no more a continuation of the arbitration than an action on the award would be. Such an action would obviously be a proceeding entirely outside the arbitration, and the summary proceeding by summons, which is substituted for it under the Arbitration Act, 1889, appears to me to be no less so.

Appeal allowed.

Solicitor for petitioning creditors: *Alfred Bright, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitors for debtor: *Collyer-Bristow, Russell, Hill & Co.*

E. L.

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[IN THE COURT OF APPEAL.]

ANDREWS *v.* MOCKFORD AND ANOTHER.

Company—Misrepresentation — Prospectus — Intention to induce Purchase of Shares—Liability to Purchaser—Publication of False Statements confirming those of Prospectus—Purchase of Shares by Person who had received Prospectus—Liability of Person causing Publication.

Where the object with which the prospectus of a company is issued is not merely to induce application for an allotment of shares, but also to induce persons to whom it is sent to purchase shares in the market, its function is not exhausted when the company has gone to allotment, and the person issuing the prospectus is responsible for the consequences of a false representation contained in it, and known to him at the time to be false, to any person to whom the prospectus has been sent who is induced by the false representation to purchase shares, and thereby sustains a loss.

Peek v. *Gurney* (L. R. 6 H. L. 377) distinguished.

Where a person who has issued the prospectus of a company, containing a false representation, known to him at the time to be false, subsequently causes to be published a false representation to the same effect as that of the prospectus, with the direct intent of inducing persons to purchase shares in the company, he is responsible for the consequences of so doing to any one who, having received a prospectus, purchases shares on the faith of the false representation so published, and thereby sustains a loss.

APPLICATION that judgment should be entered for the defendants or for a new trial.

The case was tried before the Lord Chief Justice, and was an action against the defendants for conspiring together to defraud the plaintiff by inducing him by false and fraudulent statements to purchase shares in a company called the Sutherland Reef Company. The defendants were father and son, and it was proved that W. G. S. Mockford, the father, formed a company, called the Harmony Proprietary Company, with a view that this company should purchase from him a tract of land in the northern part of the Transvaal. There were six other signatories besides Mockford senior to the memorandum of association, including among them the defendant Mockford junior, and each of the six held one share, the whole of the remaining shares being held by Mockford senior. The defendants then promoted a company, to be called the Sutherland Reef Company, to purchase a part of the property held by the Harmony Proprietary Company, and they issued a prospectus, of which a copy was sent to the plaintiff. The Sutherland Reef Company were to purchase of the Harmony Company partly for cash and partly by allotment of shares. This prospectus contained statements as to the gold-bearing reefs on the property and the yield of gold from a ton of quartz, which was alleged to amount to pounds weight instead of ounces. The company went to allotment. The plaintiff kept this prospectus by him, but did not apply to have any shares allotted to him, although he noted from time to time the prices at which the shares stood. About seven months after he had received the prospectus he read in the *Financial News* the following paragraph, headed "A big jump in Sutherland Reefs." "The sudden rise in the shares of the Sutherland Reef, Limited, is due to a very rich discovery on the property. During the last few months the company's engineer has been developing the reef, and a telegram just to hand brings the welcome news that the main shaft is now down fifty feet, and that a cross-cut driven at that depth has opened up a large body of payable ore, assaying by Government assay 24 ounces to the ton." In fact, a telegram had been received by Mockford senior from the manager (who was also a son of Mockford senior) as follows: "Sutherland Reef. Main shaft down fifty feet; discovered large body of pay ore,

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assays 24 ounces to the ton." On reading the paragraph as to the mine the plaintiff bought fifty shares, the cost of which, with stamps, fees, and commission, was 411*l.* 15*s.* 6*d.* From that time the shares went down in price, and within a year the company was wound up, without having ever paid a dividend.

The case was tried before Lord Russell of Killowen C.J., who left a number of questions to the jury. The first four of these, with the answers of the jury, were as follows:—

(1.) Did the defendants conspire to defraud the plaintiff as one of the public by promoting sham companies, the Harmony and the Sutherland Reef?—Answer. Yes.

(2.) Did the defendants authorize the prospectus of the Sutherland Reef to be sent to the plaintiff?—Answer. Yes.

(3.) Did they do so to induce an application for shares to the company, or to induce the plaintiff to buy the shares in the market, or both?—Answer. Both.

(4.) Did the plaintiff, in consequence of that prospectus, buy shares in the open market?—Answer. Yes.

The next two questions related to the creation of fictitious prices, and the non-disclosure of a contract material in the formation of the Sutherland Reef Company. The remaining questions were as follows:—

(7.) Was the telegram a genuine telegram, or a false and concocted one in the sense that there was no such discovery as to warrant the sending of the telegram?—Answer. False.

(8.) If false and concocted, was it so to the knowledge of the defendants or either of them?—Answer. Yes, of both.

(9.) Was it published by the defendants or either of them?—Answer. By both.

(10.) Was it calculated to bring about the result that the plaintiff and others would buy shares in the market?—Answer. Yes.

(11.) Did the plaintiff in consequence of that telegram, and acting upon it, buy shares?—Answer. Yes.

The jury assessed the damages at the cost of the shares, 411*l.* 15*s.* 6*d.*, and the learned judge entered judgment for the plaintiff for that amount.

The defendants appealed.

Carson, Q.C., and *Abrahams*, for the defendants. There was no evidence to go to the jury of any cause of action against the defendants. Assuming that the statements in the prospectus were false, and that those who put forth the prospectus were conspiring to induce those to whom it was sent to become allottees of shares in a sham company, the damage sustained by the plaintiff did not arise from the prospectus. He did not apply for an allotment of shares in the company upon the faith of the prospectus, but purchased the shares long afterwards in the market. It was held in *Peek* v. *Gurney* (1) that the proper purpose of a prospectus of an intended company is to invite persons to become allottees of the shares or original shareholders in the company, and that, when it has performed this office, its effect is exhausted. A person who, having received a prospectus, waits to see whether the company is a success on the Stock Exchange, and then buys shares, cannot be considered to buy with reference to the statements in the prospectus.

There was no evidence that the telegram mentioned in the article in the *Financial News* was a false and concocted telegram on the part of the defendants. Assuming that it was, and that the plaintiff purchased in consequence of reading the article, the authorities shew that this is too remote a consequence to form the basis of an action for false representation.

A false representation made by one person to another, upon which a third person acts to his detriment, cannot afford a ground of action to that third person, unless it is shewn that it was made with intent that it should be communicated to and acted upon by him. An action will not lie at the suit of any third person to whose knowledge it may come, and who acts upon it, and that is the position of the plaintiff in this case: *Rex* v. *De Berenger* (2); *Peek* v. *Gurney* (1); *Salaman* v. *Warner*. (3) The plaintiff has no cause of action arising out of the prospectus or out of the statement of the newspaper, and the jury should have been so directed.

Astbury, Q.C. (*McCall, Q.C.*, and *T. M. Whitehouse*, with him), for the plaintiff. There was evidence to support all the

(1) L. R. 6 H. L. 377. (2) 3 M. & S. 67.
(3) 65 L. T. (N.S.) 132.

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findings of the jury. The false statements of the prospectus were made to the plaintiff, and were intended to induce him to purchase shares. The effect of the prospectus was not limited, as in *Peek* v. *Gurney* (1), to the time up to allotment, and consequently the case comes within the first proposition of Wood V.-C. in *Barry* v. *Croskey* (2), quoted with approval by Lord Cairns in *Peek* v. *Gurney* (3), to the effect that "every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damnified." The plaintiff is, therefore, entitled to judgment, even if the publication of the telegram is not taken into consideration.

The case also comes within the third proposition of the Vice-Chancellor, also approved by Lord Cairns. That proposition is that, in the case of statements not made direct to the person seeking redress, "to bring it within the principle the injury must be the immediate, and not the remote, consequence of the representation thus made. To render a man responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified, it must appear that such false representation was made with the direct intent that it should be acted upon by such third person, in the manner that occasions the injury or loss." The false statements communicated to the newspaper were made to influence those who had received the prospectus, and amongst others the plaintiff. The findings of the jury bring the case directly within this proposition. The defendants have no right to separate the prospectus and the statement in the newspaper: they were all parts of one fraud intended to induce the purchase of shares with the object of creating a market for the shares, so as to provide a fund from which the cash to be paid to the Harmony Company could be procured, and to facilitate the sale of the shares held by that company. The object was, therefore, to injure the plaintiff and to advantage the defendants; and it is not material that the shares actually purchased by the plaintiff cannot be traced to

(1) L. R. 6 H. L. 377. (2) 2 J. & H. 1.
(3) L. R. 6 H. L. 377, at p. 412.

either of the defendants. [He cited in addition *Bedford* v. *Bagshaw* (1) and *Scott* v. *Dixon*. (2)]

Carson, Q.C., in reply.

LORD ESHER M.R. I am of opinion that this appeal should be dismissed. A new trial is moved for on three grounds, the first of which is that there was no evidence to go to the jury in support of the plaintiff's case. The second point is, that evidence had been wrongly admitted; but I need say no more about that point except that I think it comes to nothing. The third point raised is that there was misdirection by the learned judge; but the only suggestion in support of this is that the learned judge should have directed a verdict for the defendants on the ground that there was no evidence in support of the plaintiff's case. The case is therefore reduced to this—Was there evidence on which the jury could find as they did? I think it is obvious that the case put forward by the plaintiff in evidence entitled the jury to take the view that the defendants issued to the plaintiff personally a prospectus of the proposed company. There was evidence, and, to my mind, strong evidence, that the prospectus was fraudulent: that it contained a fraudulent description of the Sutherland Reef Mine which the defendants knew to be false, and that when the defendants sent it to the plaintiff they did not merely mean it to be an invitation to subscribe to the mine, but they had in their minds the intention to carry out the fraud and support the prospectus by other and fraudulent means. Further, there is evidence that they subsequently did this by having a telegram sent by the manager, who was a son of the elder defendant, from Africa. There was evidence on which the jury could find that the sending of the telegram was suggested to this son, and that it was arranged that the telegram was to contain statements as to the working of the mine which the defendants knew to be untrue, and that this was done not merely for the purpose of inducing people who had not received the prospectus to take shares in the company, but for the express purpose of

(1) 4 H. & N. 538; 29 L. J. (Ex.) 59.

(2) 29 L. J. (Ex.) 62, n. to *Bedford* v. *Bagshaw*.

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strengthening the effect of the prospectus on the minds of those to whom it had been sent. The plaintiff did not see the telegram, so that the matter must be carried a step further. I am satisfied that there was evidence on which the jury could find that the defendants sent to the *Financial News*, in order that it might be published, either the telegram or the article which elaborated it and connected it with the prospectus. This was done for the purpose of carrying out the original intention to strengthen the effect of the prospectus, and to induce those to whom it had been sent, if they had not already done so, to buy shares.

The jury have drawn the conclusion that there was one continuous fraud by which the defendants induced the plaintiff, to whom a prospectus had been sent, to buy shares. If this be so, I think the defendants are liable to the plaintiff, and the jury were entitled to find a verdict for the plaintiff on the ground that the case comes within the third of the propositions of Wood V.-C. in *Barry* v. *Croskey* (1), quoted with approval by Lord Cairns in *Peek* v. *Gurney*. (2) The proposition is that the injury complained of must be the immediate and not the remote consequence of the representation made, and that "to render a man responsible for the consequences of a false representation made by him to another, upon which a third person acts, and, so acting, is injured or damnified, it must appear that such false representation was made with the direct intent that it should be acted upon by such third person, in the manner that occasions the injury or loss." The false representation in the newspaper on which the plaintiff acted, and by so doing was damnified, was made with the intent that it should be acted on by any person who had already received the prospectus. The jury have found that the natural consequence of the publication in the newspaper was that the plaintiff should buy shares; and, if so, the injury received by the plaintiff was the immediate, and not the remote, consequence of the representation thus made. It follows, therefore, that the plaintiff was entitled to recover, and that this appeal must fail.

(1) 2 J. & H. 1. (2) L. R. 6 H. L. 377, at p. 413.

A. L. SMITH L.J. At the end of the argument for the appellants yesterday I had come to the conclusion that the judgment given for the plaintiff must stand, and I have since put into writing the opinion at which I had then arrived.

The plaintiff in this action seeks to recover damages from the defendants for having by fraudulent devices induced him to purchase shares in a sham or pretended gold-mining company, for which he has paid the sum of 411*l.* 15*s.* 6*d.*; and the jury, in answer to specific questions left to them by the Lord Chief Justice, have found that the plaintiff has established his allegation, and have given a verdict for him for the amount claimed, for which judgment has been entered.

Application is now made to this Court to enter judgment for the defendants or for a new trial, upon the grounds that there was no evidence to support the plaintiff's case; misreception of evidence; misdirection. The case made by the plaintiff against the defendants is this—that the defendants fraudulently agreed together to publish and to have sent to the plaintiff, and did send to him, a prospectus of a company, the Sutherland Reef Company, which they knew, when brought out, would be a sham or pretended company, in order to induce the plaintiff to purchase shares therein; that the plaintiff did not then do so; that the prospectus so issued, having produced but a scanty subscription for shares, the defendants thereupon fraudulently caused to be published in the *Financial News* a telegram, which they knew to be false, in order to stimulate and bring about that which the prospectus had been intended to effect but had failed in doing; that the plaintiff, believing in the truth of the telegram confirming, as he thought it did, the statistics given in the prospectus, was thereby induced to purchase the shares; whereby he was damnified.

The Lord Chief Justice left a number of questions to the jury, of which the first four are material to the point I am now upon. The effect of them is this—that the defendants conspired to defraud the plaintiff, as one of the public, by promoting sham companies; that both the companies were shams; that the defendants authorized the prospectus of the Sutherland Reef Company being sent to the plaintiff; that they did so to

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induce an application for shares and to induce him to buy shares in the open market; and that the plaintiff in consequence bought shares. It appears to me that this makes out the plaintiff's case; but it is said there is no evidence to support some of these findings.

The plaintiff gave evidence, and there was none brought forward to contradict him on the part of the defendants, who were both in Court, that he received the prospectus sent to him by post (it was not disputed that the prospectus had been issued by the defendants); that having read it he did not then apply for shares, but laid it aside for a time; that he afterwards saw the telegram in the *Financial News*, and, believing that its contents were true, and that it confirmed the statistics in the prospectus, he thereupon purchased the shares —in other words, that he purchased, upon the faith of the statements contained in the prospectus, supplemented by the statements in the telegram, which last statements were that a shaft had been driven, and that a large body of payable ore had then been opened, assaying by Government assay twenty-four ounces to the ton.

It is now argued on behalf of the defendants that on the evidence the plaintiff did not purchase the shares by reason of the conjoint operation of the prospectus and the telegram, but only upon what he saw in the *Financial News*; but as to this I will refer to a passage in the judgment of the Lord Chancellor in *Arnison* v. *Smith* (1), which is very pertinent to this point: "It is an old expedient, and seldom successful, to cross-examine a person who has read a prospectus, and ask him as to each particular statement what influence it had on his mind, and how far it determined him to enter into the contract. This is quite fallacious; it assumes that a person who reads a prospectus and determines to take shares on the faith of it can appropriate among the different parts of it the effect produced by the whole." These remarks are applicable to the attempt to divide this case into parts.

Evidence was given that the telegram was published at the defendants' instance in the *Financial News*. One of the main

(1) 41 Ch. D. 348, at p. 369.

points insisted on by the defendants was that there was no evidence of this. I am of opinion that there was. [The Lord Justice then dealt with this matter and with the evidence as to the falsity of the telegram.] It was not really insisted upon before us that there was no evidence that the company was a sham and a fraud, or that there was no evidence that the prospectus contained false and fraudulent statements—indeed, this could not have been seriously argued upon the facts of the case. It was said that, assuming all this, and that the telegram was proved to have been published at the instance of the defendants with a fraudulent intent, and that the contents were false to their knowlege, and that the plaintiff really did act upon the conjoint representation of the prospectus and the telegram, nevertheless the Lord Chief Justice should have directed judgment for the defendant upon the grounds, firstly, that *Peek* v. *Gurney* (1), in the House of Lords, has decided that when shares are purchased upon the market, and not taken by allotment from a company, fraudulent misstatements in a prospectus cannot be relied upon by a purchaser, because the prospectus had theretofore performed its function, which was only to obtain purchasers from the company of shares by allotment, and so the plaintiff had no cause of action on the prospectus; and, secondly, that the false statements in the telegram could not be relied upon by the plaintiff, because it had been pointed out in reference to the case of *Rex* v. *De Berenger* (2) that the propagation of false news of peace, whereby the price of the funds was sent up, did not give a cause of action for damage to one of the public who had been deceived and injured thereby, through having purchased stock when unduly inflated by the false news; and the judgment of Page Wood V.-C. in *Barry* v. *Croskey* (3), dealt with by Lord Cairns in *Peek* v. *Gurney* (4), was referred to. In my opinion, without discussing the effect of these cases, neither decision governs the present one, which is a case of continued systematic fraud from its commencement to its end.

The effect of the findings of the jury as to the telegram is

(1) L. R. 6 H. L. 377.
(2) 3 M. & S. 67.
(3) 2 J. & H. 1.
(4) L. R 6 H. L. 377, at p. 412.

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that the telegram was false and concocted to the knowledge of both defendants, and published to induce the plaintiff, amongst others, to buy shares on the market, and that he did in consequence buy shares. I have already dealt with the evidence on which the jury might find, if such evidence was unanswered, that the telegram was false and concocted, and the result of their findings is to bring the case within the proposition of Wood V.-C. in *Barry* v. *Croskey* (1), which deals with the responsibility of a man for a false representation made by him to another on which a third person acts.

Upon these findings there was proved against the defendants a continuous fraud on their part, commencing with the sending of the prospectus to the plaintiff, and culminating in the direct lie told in the telegram, which was intended by the defendants to operate upon the plaintiff's mind as well as on the minds of others, and did so operate to his prejudice, and to the advantage of the defendants. It is not taking the correct view of the case to sever it into parts, as the defendants' counsel sought to do, and to argue that the prospectus by itself would not support a cause of action, and that the telegram by itself would not do, and since two nothings make nothing, the combination of the two does not support a cause of action. This case must be taken as a whole. In this case the function of the prospectus was not exhausted, and, indeed, in answer to the third question, the jury so find; and the false telegram was brought into play by the defendants to reflect back upon and countenance the false statements in the prospectus.

For these reasons the plaintiff, in my opinion, is entitled to retain the judgment entered for him.

RIGBY L.J. I am of the same opinion. The case has been argued in the only way in which it could plausibly be presented to the Court—that is to say, by dividing it into parts and treating each one separately. To my mind, that is not permissible. The case made was one of fraud from the very inception of the company: fraud in each of the stages of its progress; a sham company created for the purpose of inducing

(1) 2 J. & H. 1.

the public to believe that there was a real one; a fraudulent prospectus, not merely for the purpose of inducing the public who read the prospectus to take shares by allotment from the company, but, as the jury have found, for the purpose also of inducing the readers of the prospectus, if they did not get shares by allotment, to get them by purchase; and further frauds—or rather one fraud running throughout a great number of stages. I may say, first of all, that on the findings of the jury, irrespective of the prospectus, and if the prospectus ought to be laid aside as an inducement to the plaintiff to buy, I think there is quite enough to justify the judgment that has been entered. The prospectus is in any case, and even if the plaintiff had never seen it, evidence of the fact that the defendants made a statement to the effect of the telegram afterwards received. But I do not wish to avoid the question arising on the issue of the prospectus as it has been argued before us. In my judgment, there is nothing in *Peek* v. *Gurney* (1), or in any other case, which precisely meets the present one. Undoubtedly, if there be a prospectus issued for the sole purpose of obtaining subscriptions for the original capital of the company, or subscriptions for any issue of shares about to take place, and if that can be treated as a separate transaction, people who did not respond to that invitation, and did not act upon it in the way which it was intended to be acted upon, but who afterwards bought shares in the open market, cannot rely on statements in the prospectus, which they may be able to establish as being fraudulent misrepresentations. It is, however, a totally different matter when the conclusion is arrived at that the prospectus was not intended solely, or even primarily, for the purpose of getting the public to subscribe to the shares. If the object was, in pursuance of a deliberate scheme of fraud, to impress the minds of all persons who read the prospectus with the idea that the sham company which was created was a real and most prosperous company—if that was a part of the scheme, and if, after the issue of the prospectus, that scheme was continued by other devices intended to produce the same results, it is idle to say there is any rule of law or any principle which should

(1) L. R. 6 H. L. 377.

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oblige us to shut our eyes to that portion of the fraud which was contained in the prospectus. I repeat, however, that it appears to me that, even if we were bound to put aside the findings as to the prospectus as an inducement to the plaintiff to buy, there is in the other findings, if they can be supported—that is to say, if there was any evidence to go to the jury upon them—what is amply sufficient to justify the judgment in favour of the plaintiff.

That the telegram was undoubtedly false, that it did not correspond with the facts of the case, is patent. It was said, however, that there was no evidence that the telegram was not believed in by the defendants. Now in substance the telegram was a mere repetition, in different words, of the statement to the same effect made in the prospectus—a statement for which the defendants are responsible, which was to their knowledge absolutely groundless, and which was made fraudulently by them. To suppose that when they found their own fraudulent misstatement repeated in the telegram, arriving so opportunely, they believed it to be true, would be to credit them with a credulity which no jury was bound to impute to them. Having regard to the way in which the telegram was dealt with when received, it seems to me that there was strong evidence from which a jury might infer that the defendants had no such belief. [The Lord Justice then dealt with the evidence that the telegram was published by the defendants.]

The learned counsel for the defendants raised a point of law on the telegram. He said, assuming that it was a false telegram, there is no case for the plaintiff to sustain an action for damages. The facts existing in the case of *Rex* v. *De Berenger* (1) have been referred to as an illustration, and it is necessary to see what principle of law would have been required to sustain an action in such a case. There was a false report which was intended to lead to the conclusion that peace was imminent. A man acting upon that might have done many things besides buying public funds. He might have bought French funds, or bought land in France, or incurred expenses in preparing to act upon the making of peace with France.

(1) 3 M. & S. 67.

It seems to me that the principle required would be this—that when a man tells a lie he is responsible for every sort of damage that accrues to any person, wherever he may be, who hears of the lie, and takes action upon it, whatever the nature of that action may be. So extravagant and extensive a rule as that would in all probability lead to fraud to such an extent that no system of law would support it, and this, I think, was the opinion of Fry L.J. from what he said in *Salaman* v. *Warner*. (1)

What was done in the case before us was something totally different. The publication of the contents of the telegram was an invitation to members of the public who were thinking of investing money to buy shares of the Sutherland Reef Company. The jury have found that it was intended to be acted upon in that manner, and I do not see any reason to differ from them in the verdict they have arrived at. From this point of view *Rex* v. *De Berenger* (2) has nothing to do with the present case. The Lord Chief Justice pointed out that nothing said by Wood V.-C. about *Rex* v. *De Berenger* (2) led him to say that there was no case for damages here; and I venture to repeat that nothing that has been said, nothing that could probably be said about that case, would, in my view, alter the liability of persons who, being the owners of property, procure false statements to be made about that particular property, in order to induce members of the public to buy that property from them. On these grounds I agree that the appeal should be dismissed with costs. (3)

Appeal dismissed.

Solicitors for plaintiff: *Nunn & Popham.*

Solicitors for defendants: *Michael Abrahams, Sons & Co.*

(1) 65 L. T. (N.S.) 132.

(2) 3 M. & S. 67.

(3) 1896. January 31. Application having been made, at the close of the case, on behalf of the plaintiff, that the cost of a shorthand writer's note of the summing-up should be allowed on taxation, the Master of the Rolls intimated that the Court would consult the other Lords Justices, and now stated that the conclusion arrived at was that there was no hard and fast rule that such costs should never be allowed, but that they would be allowed only in very exceptional cases. He added that the present case was not exceptional, and therefore the costs would not be allowed.

A. M.

C. A.
1896
Feb. 20.

[IN THE COURT OF APPEAL.]

TOMLINSON *v.* BROADSMITH and Another.

Partnership—Authority of Acting Partner—Defence of Action against Firm—Employment of Solicitor—Entering Appearance in Names of Partners—Communication of Progress of Action to other Partners—Negligence—Order XLVIII. *A, r.* 5.

A managing partner of a business firm has an implied authority to employ a solicitor to defend an action brought against the firm for the price of goods supplied to the firm in the ordinary course of business.

A solicitor employed by the managing partner of a business firm to defend an action brought against the firm in the firm name has authority to enter an appearance in the names of each of the partners individually, and is not guilty of negligence in not keeping the partners, other than the managing partner by whom he was employed, informed of the progress of the action.

Appeal by the defendants from a judgment in favour of the plaintiff.

The action was brought against a firm of solicitors on the ground that they had without authority entered an appearace for the plaintiff in an action brought against a firm of which he was said to be a partner; and alternatively, that if the defendants had authority to act as the plaintiff's solicitors they had acted negligently as such solicitors.

It appeared that one Horton, the plaintiff, and one Preston had made an agreement by deed as to the carrying on and developing of a business, and the effect of the deed as held by the learned judge at the trial, and by the Court of Appeal, was to constitute them partners.

Horton had the management of the business, and an action was brought against the firm for the price of goods ordered by him and supplied for the purpose of the business. Horton thereupon authorized the defendants to act as solicitors for the firm, and they entered an appearance for each of the partners as required by Order XLVIII. A, r. 5. Judgment was recovered in that action under Order XIV., and execution was levied on the goods of the plaintiff. He paid out the execution, and brought

this action against the solicitors for acting without his authority in entering an appearance for him, and further, assuming that they had such authority, for negligence in not informing him that judgment had been obtained, whereby he was prevented from satisfying the judgment, and his goods were seized and his credit injured.

In answer to questions put by the learned judge, the jury found that the defendants had no authority express or implied to enter an appearance or to act for the present plaintiff in the action against the firm, and that even if they had they acted negligently in the performance of their duty as solicitors. The damages were assessed at 200*l.*, and the learned judge (Kennedy J.) entered judgment for the plaintiff for that amount.

The defendants applied for a new trial, or that the judgment should be entered for them.

Joseph Walton, Q.C., and *W. F. Taylor, Q.C.*, for the defendants. There was no evidence to go to the jury on either of the matters left to them. The injury, if there was any, was due to the judgment, and not to appearance having been entered: *Westaway* v. *Frost*. (1) Further, it must be within the scope of a managing partner's authority to defend actions brought against the firm. The consequences might be very serious if this were not so, for he might not be able to obtain express authority from partners at a distance. If he has implied authority to defend actions brought against the firm he can employ a solicitor to do this, and to do it in the only way authorized by the rules, that is by entering an appearance for each of the partners under Order XLVIII. A, r. 5 (2); and as he is the person with whom the solicitor is in communication, there is no negligence in the solicitor not informing the other partners of the progress of the action.

Pickford, Q.C., and *E. Acton*, for the plaintiff. Carrying on litigation is not the ordinary business of a trading firm, so as to entitle one partner to bind the others: *Hambidge* v. *De la*

(1) 17 L. J. (Q.B.) 286.

(2) Order XLVIII. A, r. 5: "Where persons are sued as partners in the name of their firm, they shall appear individually in their own names; but all subsequent proceedings shall, nevertheless, continue in the name of the firm."

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TOMLINSON v. BROADSMITH.

Crouée (1); *Adams* v. *Bankhart*. (2) The statement in Lindley on Partnership, 6 ed. p. 280, is that "one partner may defend an action brought against the firm, indemnifying the firm against the consequences of so doing, if he acts against the will of the other partners." If this is accepted it shews that the right is a qualified one; but the cases to which reference is made in the note do not support the text. *Goodman* v. *De Beauvoir* (3) was the case of a member of a committee who had agreed to be bound by the majority; and *Harrison* v. *Jackson* (4); *Morley* v. *Strombom* (5), and *Goldsmith* v. *Levy* (6) have no relation to the authority of a partner to enter an appearance.

The defendants had no authority to enter an appearance for each partner individually. They ought either, as there was no defence to the action, to have entered no appearance, or else to have entered an appearance for Horton alone, leaving the liability of the persons who disputed the partnership to be determined after judgment, under Order XLVIII. A, r. 8.

Even if there were the authority claimed it would not justify the solicitors in keeping the other partners of the firm in ignorance of the fact that judgment had gone against them, and that they were liable to have their goods seized.

W. F. Taylor, Q.C., in reply, cited *Whitehead* v. *Hughes*. (7)

LORD ESHER M.R. In this case the plaintiff has brought an action against a firm of solicitors because he says that they have entered an appearance for him in an action without his authority, and further that if they had authority to enter an appearance for him they have been negligent. The case was tried before Kennedy J. and a jury, who found on both points in favour of the plaintiff, for whom judgment was given. The defendants appeal on the ground that there was no evidence on either branch of the case, and that, therefore, the judgment should have been entered for them.

It appears that Horton, the plaintiff Tomlinson, and one Preston were partners in a trading business. It is true that

(1) 3 C. B. 742.
(2) 1 C. M. & R. 681.
(3) 12 Jur. 989.
(4) 7 T. R. 207.
(5) 3 B. & P. 254.
(6) 4 Taunt. 299.
(7) 2 C. & M. 318.

the two last named asserted that they were not partners, and whether they were so or not depended on a deed entered into by the three. The construction of the deed was for the judge, who ruled that it established that the three were partners, and with that ruling we agree. That being the state of things, the three of them agreed that Horton should be managing partner of the business, and that gave him authority to manage all matters which arose in the ordinary course of business of the firm, and among other things to order goods. An action was brought by persons who had supplied goods to the firm, and the question is whether such an action is an ordinary incident of business. I am clear that it is, and that the managing partner had authority to deal with such an action, and to defend it. The partners were sued in the name of their firm, and in such a case Order XLVIII. A, r. 5, provides that they shall appear individually in their own names, but that the subsequent proceedings shall continue in the name of the firm. The managing partner having a right, in the ordinary course of business, to defend the action, had authority to instruct a solicitor to enter an appearance for the other two, as provided for by the rule I have quoted. Some criticism has been directed to the passage quoted from Lindley on Partnership, where several cases are cited as instances of the matter referred to. Looking at those cases, I do not think that they directly decide the point stated in the text. The first case cited there is *Goodman* v. *De Beauvoir*. (1) It is true that case relates to members of a committee, but it seems to me to be an authority that where there are people in the position of partners appointing one of themselves to be the managing partner, he has authority to enter an appearance for the others. It is clear to me that there was an implied authority in Horton to appoint solicitors to defend the action for the firm, and that when he exercised that authority the solicitors could properly enter an appearance in the names of the other partners. That, however, must be taken with this qualification, that nothing had been done to take away the authority of Horton or of the solicitors. I have a strong opinion, though, as the question does not arise in this case, I do not give a judgment upon the point, that

(1) 12 Jur. 989.

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Lord Esher M.R.

merely forbidding the managing partner doing a particular thing which came within his general authority would not be sufficient, but that it would be necessary to go further, and withdraw the general authority. In this case there is no evidence that the plaintiff did forbid Horton, or do anything to take away his authority to enter an appearance and carry on the suit in the ordinary way. The judge ought to have directed the jury that the head of complaint against the defendants for acting without authority could not be supported for want of evidence It is then said that, if Horton had authority to employ the defendants, they acted negligently in the conduct of the case as solicitors for the plaintiff, because they did not inform him that judgment had gone against him. It would be a very far-reaching duty to impose on a solicitor who appears for a partnership to require him, however many partners there were, to send to each notice that judgment had gone against the firm. The defendants informed the managing partner, who had up to that time been left by the plaintiff in that position, that judgment had gone against the firm, and they had a right to assume that the managing partner would inform his co-partners of the result of the proceedings. On this point, therefore, there was no evidence of negligence; and as the plaintiff has failed on both points, there ought to be judgment for the defendants.

LOPES L.J. It seems to me to be good law to say that the managing partner of a business firm had implied authority to direct a solicitor to enter an appearance on behalf of the partnership, to an action brought against the partnership, in respect of claims made against the firm. I think the case of *Goodman* v. *De Beauvoir* (1) is an authority for that statement. In order to get rid of this authority it would be necessary to shew that it had been expressly negatived. Whether it could be so without removing the managing partner from the position he occupies and determining his authority is a matter on which I do not think it is necessary to express an opinion. I think that, in this case, there was no evidence that the implied authority of Horton was expressly negatived, and I think the

(1) 12 Jur. 989.

learned judge should have held that there was authority, and should have so directed the jury. The plaintiff also argues that, if there was authority to enter an appearance for him, there was negligence in the conduct of the action in this respect, that it was the duty of the defendants to communicate to the plaintiff personally that judgment had been obtained under Order XIV. This was communicated to the managing partner, and I see no evidence of neglect on the part of the defendants in not doing more than communicate with the person from whom they were taking their instructions—indeed, it does not appear to have been even an error of judgment on their part.

RIGBY L.J. I agree entirely. It appears that Horton was carrying on a business, and that the plaintiff and Preston entered into a written agreement with him, which I have no hesitation in saying constituted a partnership between the three. The whole scheme of the partnership was that Horton should carry on the business as he had done before, and that he should do this as managing partner. That being so, he ordered goods for the purpose of the business. A writ was issued in respect of the price of some of these goods against the firm in its firm name. The managing partner instructed the defendants, as he had a right to do, to defend the action. The claim had to be satisfied at once, or the action must be defended. If there was no hope of ultimately defending the action, at any rate time might be gained in which to obtain the money. There was a letter from the defendants to the plaintiff as to the position of the firm, suggesting an interview which afterwards took place. As to this, I think we may accept the finding of the jury that there was no authority given at that meeting by the plaintiff or Preston to Horton or the defendants in regard to defending an action; but I cannot doubt that Horton had authority by reason of the relation of the parties. It is an idle thing to say in one breath that Horton was to carry on the business, and to be the responsible manager, and yet that he was not to move in such a matter as this, in which the welfare of the partnership was concerned, because the other partners did not choose to do so. It was not intended that they should

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Rigby L.J.

take an active part in the business. There is a dispute as to what occurred at the meeting; but even if it had been clearly expressed—which I do not think that it was—that the plaintiff and Preston would not do anything to defend an action, I do not see what difference that would make. I do not think they had a right to say that the action should go undefended, or that it should be defended otherwise than in the way in which actions against a partnership are properly defended. Suppose that the affair had been the other way about, and that the claim had been against a customer of the firm, and a partner had said he would not allow the name of the firm to be used, still the managing partner might have said that he intended to use the name because he had a right, of which he could not be deprived, to take the proper steps to get in what was due to the firm, subject possibly to the right of the other partner, by taking proper steps, to obtain an indemnity. I think the same may be said with regard to a defence. The other partner would have no right to say that his name should not be used if the proper course is to use the names of the individual partners. I do not think that this is altered by saying "there is no partnership." That was an assertion which, however sincerely made, they had no right to make.

As to the alleged negligence, I quite concur in the view that there was none. The solicitors informed the partner from whom they got their instructions that judgment had been entered against the firm, and they had a perfect right to consider that in communicating with him they were taking the usual and regular steps for communicating with the other defendants for whom they had entered an appearance.

I think, therefore, the action fails, and that judgment should be entered for the defendants.

Appeal allowed.

Solicitors for plaintiff: *Pritchard, Englefield & Co., for Charles Costeker, Darwen.*

Solicitors for defendants: *Le Riche & Stevens, for J. O. Twemlow, Manchester.*

A. M.

ATKINSON *v.* MAYOR, &c., OF CARLISLE.

1896
Feb. 4.

County Court—Costs—Fees to Counsel—Special Allowance where no local Bar.

In a taxation of costs in a county court on the higher scale, the special item No. 86 which may be allowed by order of the judge to counsel where there is no local bar in, or within twenty miles of, the court town, can only be allowed once in the same case, although the counsel engaged may have been present in court on more than one occasion.

APPEAL from the county court judge for Cumberland, affirming the decision of the registrar on a taxation of costs.

In the action, which involved a question of title, the learned judge gave judgment for the plaintiff. He directed that the costs should be taxed upon Scale C, and ordered, under Order L. A, r. 7, that item 86 in the scale of costs should be allowed to the plaintiff (1), there being no local bar in the court town, or within twenty miles thereof. The case could not be finished at a single hearing, and counsel was present in court on four different days during its progress. In the plaintiff's costs, as carried in for taxation by his solicitor, the sum of 2*l.* 4*s.* 6*d.* under item 86 was charged in respect of each of the four days on which counsel was present in court for the purposes of the case. The registrar was of opinion that he had no power to allow item 86 more than once in the same action, and disallowed the item in respect of three out of the four days. On review of the taxation by the judge, the registrar's decision was affirmed for the same reason.

The plaintiff appealed.

(1) By Order L. A, r. 7, of the County Court Rules, 1889, "The judge may, in his discretion, in any action . . . . in which title to any corporeal or incorporeal hereditaments comes in question, order that any of the following items mentioned in the scale of costs shall be allowed to the party in whose favour the order is made, in addition to or in substitution for, as the case may be, the costs to which he would otherwise be entitled, viz., items 31, 70, 86, and 93."

Item 86 is as follows: "In the cases mentioned in Order L. A, r. 7, where there is no local bar in the court town, or within twenty miles thereof, a further fee may be allowed by order of the judge, if in his opinion the maximum fee allowable on the brief is insufficient, not exceeding . . . . 2*l.* 4*s.* 6*d.*"

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Cavanagh, for the plaintiff. The object of the allowance is to place counsel going to a distant county court on the same footing as the local bar. Whether the item is to be considered as a new brief or as a refresher, it is allowable in respect of each day on which counsel was compelled to attend in court.

COLLINS J. I think that the appeal must be dismissed. The case may be one in which the judge was desirous of allowing the item for each day; but I agree with him that the master had no power to do so. The words are "a further fee," and if they are to be construed as being a fee on a new brief, then the decision is correct, for there has been allowed the maximum brief fee under the scale, together with this "further fee," or new brief fee. If the allowance is to be dealt with as a refresher, which of course excludes the possibility of dealing with it as a fee on a new brief, the decision is equally correct; for, in answer to a question from the bench, the learned counsel told us that the ordinary refreshers were allowed in this case, and there has, therefore, been an allowance of the maximum brief fee and the maximum refreshers, and that is all to which the plaintiff can be entitled on taxation. There was no power to allow the item more than once.

LAWRANCE J. concurred.

Appeal dismissed.

Solicitors for plaintiff: *Nicholson, Graham & Graham, for Scott, Carlisle.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1896
Feb. 27.

CLUTTERBUCK, Appellant; TAYLOR, Respondent.

Parliament — "Dwelling-house" — Service Franchise — "Part of House separately occupied as a Dwelling" — Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 5 — *Representation of the People Act*, 1884 (48 & 49 *Vict. c.* 3), *s.* 3.

The appellant had, by virtue of his service as a policeman, the exclusive occupation of a cubicle in a dormitory at a police station. The cubicle was separated from the rest of the dormitory, which contained a number of similar cubicles, by wooden partitions which did not reach the ceiling. The atmosphere of the dormitory was common to all the cubicles, and a gas-light was shared by them in common. A lavatory and mess-room were provided for the policemen who occupied these cubicles in another part of the police station. The policemen occupying the cubicles were subject to the control of a superior officer, who had power to impose restrictions upon their use of the cubicles inconsistent with the rights which a person ordinarily exercises in respect of his own dwelling:—

Held (by Lord Esher M.R. and Lopes L.J., Rigby L.J. dissenting), that the cubicle was not part of a house separately occupied as a dwelling within the meaning of the Parliamentary and Municipal Registration Act, 1878, s. 5, and that the appellant was therefore not entitled to the franchise in respect of it under the Representation of the People Act, 1884, s. 3.

Appeal from the judgment of a Divisional Court (the Lord Chief Justice, Grantham and Vaughan Williams JJ.) upon a case stated by a revising barrister.

The facts stated in the case were as follows. At a court held by the revising barrister for revising the lists of parliamentary electors and burgesses for the parish of St. Nicholas, in the city of Gloucester, the name of the appellant appeared on Division 2 of the list of persons entitled in respect of the occupation of property within the said parish as qualified by the occupation of a dwelling-house (service) in Bearland in the said parish. Notice of objection had been duly served upon the appellant by the respondent on the ground that the appellant had not been the inhabitant occupier of a dwelling-house for twelve months prior to July 15. The appellant was a constable, and during the whole of the qualifying period had the exclusive occupation of a cubicle in the police station at Gloucester. This cubicle

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with others was contained in a room in the police station. It was about eight feet by seven feet, and was partitioned off on three sides by a wooden partition about seven feet high, the wall of the room forming the fourth side. It was entered by a door opening into a passage which passed down the room, and of this door the appellant had the key and was entitled to close and lock it at pleasure. There was a space of two or three feet intervening between the top of the partition and the ceiling of the room. The cubicles derived daylight from the outer windows of the room, and one of the windows was wholly inclosed in a cubicle. The passage, the ventilation, and the atmosphere of the dormitory were common to all the cubicles, and a gas-light was shared in common by all the cubicles in the room. The bed and bedding were supplied by the county, but the appellant was at liberty to add any furniture of his own, and had in fact supplied a chair. He was charged and paid rent for the cubicle. The appellant used the common washing-room of the station, though he was at liberty to supply his own washing furniture if he pleased. He took his meals in the common mess-room.

The respondent contended that the cubicle was not separately occupied by the appellant as a dwelling. The revising barrister held that the case was not distinguishable from *Barnett* v. *Hickmott* (1), and therefore he erased the name of the appellant from the list. The cases of several other constables, who had occupied cubicles at the police station under the same circumstances as the appellant, and whose names were also erased by the revising barrister from the list upon objection, were consolidated with that of the appellant. The Divisional Court dismissed the appeal on the ground that the case was concluded by the decision in the above-mentioned case, and gave leave to appeal.

When the appeal first came on for hearing before the Court of Appeal they remitted the case to the barrister in order that he might answer the following questions of fact.

(1.) Has the chief constable the control of the whole building? (2.) Can he order a constable to change his cubicle? (3.) Can

(1) [1895] 1 Q. B. 691.

he order him not to receive a visitor? (4.) Can he order him not to take his meals in the cubicle? (5.) Can he order him not to have washing apparatus in the cubicle? (6.) Can he order him not to go into the cubicle in the daytime? (7.) Can the inspector order him to open the door if he is inside, so as to let the inspector go in? (8.) Can he order him to give up the key? (9.) Can the inspector order him not to smoke in the cubicle?

The revising barrister stated in answer to these questions that for the purpose of answering them he had taken the evidence of Mr. Philpotts, the deputy chief constable and superintendent of police at Gloucester, who stated as follows: that, subject to any special order of the chief constable, he had the entire charge and absolute control of the station and of the constables resident in it; that no special resolutions had been issued for the conduct of the constables while in the station or as to their use of the cubicles, such matters being left to his discretion, subject to the supervision of the chief constable; that he had no doubt as to his absolute authority over the constables in their use of the cubicles, but he had not had occasion to exercise it in respect of any of the matters to which the questions referred, nor did he interfere with the constables so long as their conduct did not annoy others or interfere with good discipline; that he had during the past two years abstained from moving men from one cubicle to another lest he should thereby interfere with their right to the franchise if otherwise qualified, and that delivery up of a key was only required when a constable was about to leave the station; that the cubicles were necessarily occupied in the day by men on night duty; that the men sometimes took food and drink in their cubicles, and also smoked there on coming in at night; that in the day they preferred meals in the mess-room; and that in addition to the mess-room a recreation-room was provided for reading, smoking, and games. As a result of this evidence the revising barrister answered all the questions submitted to him by the Court in the affirmative.

William Graham and *Garrett*, for the appellant. The question

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is whether the appellant inhabited a dwelling-house by virtue of his service or employment within the meaning of s. 3 of the Representation of the People Act, 1884. It is submitted that he did so. The term "dwelling-house" is, by the Parliamentary and Municipal Registration Act, 1878, s. 5, to include "any part of a house, where that part is separately occupied as a dwelling." The words of that definition differ from those used in the Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 61, which were "any part of a house occupied as a separate dwelling." The object of that alteration in the language appears to have been to meet the differences of judicial opinion which had arisen with regard to the necessity for structural severance in cases such as *Thompson* v. *Ward*. (1) Sect. 5 of the Parliamentary and Municipal Registration Act, 1878, further provides that, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part. Structural severance, therefore, is no longer necessary, and, if any definite part of a house is separately occupied as a dwelling, it is immaterial that it is ventilated or lighted in common with other parts. The fact that the partitions are not carried up to the ceiling, so as to make the cubicles separate rooms, is immaterial. There is nothing to make it necessary that the part of the house occupied should be a room. The fact that the occupation of the cubicle was subject to restrictions or regulations which might be made by the chief constable is immaterial. It does not appear that he did in fact make any such restrictions or interfere in any way with respect to the use made of the cubicle. In every case of the service franchise there is no tenure, and the master could, no doubt, make such restrictions. A master could, for instance, forbid his coachman to entertain visitors in a room occupied by him over the stable, or to smoke there. The fact that such restrictions on the use of the subject-matter of occupation are or might be made does not prevent the occupier from occupying it as a dwelling.

(1) L. R. 6 C. P. 327.

[They cited *Stribling* v. *Halse* (1); *Bradley* v. *Baylis* (2); *Atkinson* v. *Collard*. (3)]

Lewis Thomas and *J. H. Percival*, for the respondent. If a person occupies a part of a house which he may use for the general purposes of a dwelling, the fact that he does actually only sleep there will not prevent him from occupying it as a dwelling. But it is submitted that, where the terms on which a man occupies part of a house are that he shall only be entitled to use it for sleeping purposes, and not for any of the other purposes for which a dwelling is ordinarily used, he cannot be said to occupy it as a dwelling. A bedroom may be a dwelling; but under the circumstances this cubicle was not occupied as a dwelling.

[They cited *Hasson* v. *Chambers*. (4)]

LORD ESHER M.R. In this case the appellant did not occupy a separate house or even a separate room, but was allowed to use part of a room for certain purposes. It appears that a room at the police station was divided into compartments, called cubicles, partitioned off by boards which did not go up to the ceiling. In each of these cubicles there was a bed. In one of them the appellant by virtue of his employment as a policeman was allowed to sleep. When he was in his cubicle, the air which he breathed and the light which was given to him were not air and light confined to his cubicle, but air and light common to the whole of the room in which the other policemen were. That fact alone appears to me inconsistent with the notion that the cubicle was occupied by the appellant separately as a dwelling. But I thought it better for the purpose of deciding this case that we should have some further information as to the conditions under which the policemen at the police station occupied their cubicles. We now learn that the chief constable has control over the whole of the station and of the constables resident in it. It seems to me inconsistent with the idea of each cubicle being a dwelling separately occupied by each policeman that his use of it should

(1) 16 Q. B. D. 246.
(2) 8 Q. B. D. 195.
(3) 16 Q. B. D. 254.
(4) 18 L. R. Ir. 68

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be subject in this way to the control of another person. It appears that the chief constable can order a constable to change his cubicle whenever he thinks fit; he can order the constable not to receive a visitor, or to take his meals in his cubicle, and not to go into his cubicle in the daytime; the inspector can order him to open the door and let him in; and the constable can be ordered at any time to give up the key of the cubicle. Are these incidents which are consistent with the ordinary idea of a man's dwelling? It is not as if one or other of them had to be considered alone; it is not the case of a man occupying a separate room alone, subject to one or some of these restrictions. The facts of the case must be looked at as a whole. Here we have a room in which are several persons, and which, though divided into compartments, is not divided in such a way as to prevent it from still being one room structurally, all of the compartments having a common atmosphere and being lighted by the same light. Everything except sleeping appears as a rule to be done by the policemen in other parts of the building, and cannot be done by them in their own cubicles, except subject to the power of the chief constable to stop it at any moment. The appellant was, as it appears to me, only allowed to occupy this room by virtue of his employment as a policeman; and he must be taken, I think, to have agreed, as part of the terms of that employment, that his occupation of the room should be subject to the limitations which I have mentioned. They were, therefore, the terms of his occupation. Taking them altogether, are they consistent with the ordinary idea of a man's rights and practice in respect of his own dwelling? It seems to me that they are wholly inconsistent with and antagonistic to that idea. That being so, I do not think the appellant occupied this cubicle separately as a dwelling within the meaning of the Act, and therefore he was not entitled to the franchise. It was said that soldiers in barracks had under similar circumstances been held to be entitled to the franchise. I do not think that is so. This is not like the case of officers occupying separate rooms in barracks. I do not think that the occupation of a room in barracks by a number of soldiers in the same way as these policemen occupied would

entitle them to the franchise. For these reasons I think the appeal must be dismissed.

LOPES L.J. We are asked to reverse the judgment of the Divisional Court which decided this case on the authority of *Barnett* v. *Hickmott*. (1) I think that judgment was right, and should have been prepared so to hold without the additional information which has been given by the revising barrister in answer to the questions put to him. By the definition given in the Parliamentary and Municipal Registration Act, 1878, s. 5, a "dwelling-house" includes "any part of a house where that part is separately occupied as a dwelling." The question, therefore, which we have to consider is whether the appellant's cubicle was part of a house separately occupied as a dwelling? It is part of a room divided into compartments, which however are not completely separated from one another, so that the same air and light is common to all of them. Each compartment is used for sleeping purposes, there being a common lavatory and mess-room for the use of the constables in another part of the building. A constable using one of these cubicles is subject to divers restrictions in the use of it. The chief constable may order him not to take meals or wash in it. If required he must give up the key, and he may be prohibited from receiving a visitor in his cubicle. The chief constable may order him at any time to change his cubicle, and may order him not to enter his cubicle in the daytime. It seems to me that in reality he is only given the use of the cubicle for one specific purpose—namely, the purpose of sleeping in it for a certain portion of the twenty-four hours. Under such circumstances, can it be said that he occupies a part of a house separately as a dwelling? I think not. In my opinion, in order that the occupation may come within the definition given by the statute, it must not be subject to disabilities substantially inconsistent with the ordinary rights which a man exercises in respect of his own dwelling, and, if it be subject to such disabilities, it cannot be said to be occupation of part of a house as a dwelling.

RIGBY L.J. In this case I have the misfortune to differ from my learned brothers and the learned judges in the Divisional

(1) [1895] 1 Q. B. 691.

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Court. The question raised is whether the appellant was an inhabitant occupier of a dwelling-house within the meaning of s. 3 of the Representation of the People Act, 1884. He was, as I understand the statements made in the case, allowed, as a matter of fact, to occupy the cubicle during the whole of the qualifying period without interference. He had the key of the cubicle; and I gather that, when he was on night duty, he did in fact use it for sleeping in during the day; and, when he was on day duty, he used it for sleeping in at night. He used it, therefore, for sleeping in as occasion required; and it appears, also, that he was in fact allowed to take meals in it if he liked. Sect. 3 of the Representation of the People Act, 1884, says that, "where a man himself inhabits any dwelling-house by virtue of any office, service, or employment, and the dwelling-house is not inhabited by any person under whom such man serves in such office, service, or employment, he shall be deemed for the purposes of this Act and of the Representation of the People Acts to be an inhabitant occupier of such dwelling-house as a tenant." In this case it cannot be said that the cubicle was inhabited by any superior under whom the appellant served. Assuming for the moment that the cubicle was a "dwelling-house" for the purposes of the Act, it appears to me that the appellant was an inhabitant occupier of it during the qualifying period. I cannot see that the existence of a power in the chief constable to make regulations or restrictions with regard to the use of the dwelling-house by the appellant has anything to do with the franchise given by the section, provided that he did in fact inhabit. The section says nothing about the nature of the inhabitancy, or as to how far it may or may not be subject to restrictions; and I think we ought to be very slow to insert limitations which the Legislature has not expressly mentioned. There are, we know, cases of large establishments where a great number of persons are employed, who inhabit parts of a house by virtue of their employment, and who, in so inhabiting, must be subject to such directions as their masters choose to give. I cannot see that such directions, if actually given, could affect the existence of the franchise given by the section; but the mere fact that there was power to give directions which were not given appears to me to be quite beside the question. The

truth is that the service franchise is essentially different from the other occupation franchises. It is not given in respect of any property in or right in respect of the place occupied. It is assumed by the section that there is no such right. The person who occupies by virtue of his employment is not even in the position of a tenant at will. He is not a tenant at all, but simply a person who is permitted by his master to occupy subject to such regulations, if any, as may be made by his master. Then, was the appellant the inhabitant occupier of a "dwelling-house"? At first sight one would be disposed to say that this cubicle was a very different thing from a dwelling-house. But it is obvious that the extraordinary sense in which the term "dwelling-house" is used in the Acts relating to the franchise includes things that are totally different from anything which would in the ordinary use of language be called a dwelling-house, because any part of a house will suffice if occupied as required by the Act. It need not be any particular part of a house, and it does not matter how small it may be. The extent or nature of the part occupied is immaterial, so long as it is occupied separately as a dwelling. This cubicle was none the less part of the whole police barrack because it was part of a room in it. Whether it was what would ordinarily be called a dwelling-house is not the question. It was said that it shared the air and light common to the whole room. The Legislature appears to me to have dealt with that very consideration in s. 5 of the Parliamentary and Municipal Registration Act, 1878, which provides that, "for the purposes of any of the Acts referred to in this section, where an occupier is entitled to the sole and exclusive use of any part of a house, that part shall not be deemed to be occupied otherwise than separately by reason only that the occupier is entitled to the joint use of some other part." I can see no reason for cutting down the generality of those words, which appear to me to meet the contention based upon the enjoyment by the appellant of air and light common to the room of which his cubicle formed a part. In this case the appellant had the key of his cubicle without any interference during the whole of the qualifying period. It is true that, if

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occasion had arisen, his superior officer might have insisted on going into his cubicle for any purpose; but, as a matter of fact, he appears never to have done so. So that, if the appellant occupied this cubicle at all—and it appears to me clear that he did—his occupation was in fact separate. Then did he occupy it as a dwelling? I cannot find anything in the section which provides that, in order to come within it, the occupier must occupy with all the powers which a person would have in respect of a dwelling-house in the ordinary sense. The test, as it appears to me, is the nature of the occupation which has in fact taken place, not whether the occupier might have been ordered to occupy in a different manner. Considerable light is thrown on this question by the previous part of s. 5, which provides that "in and for the purposes of the Reform Act, 1832, and the Municipal Corporation Acts, the terms 'house, warehouse, counting-house, shop, or other building' shall include any part of a house where that part is separately occupied for the purpose of any trade, business, or profession." If part of a house is in fact separately occupied for the purpose of a trade, business, or profession, the section says that part of a house is to be deemed to be a house. The terms of the section do not seem to me to afford any ground for the idea that the part of the house must be occupied in the same manner in all respects as that in which traders or professional men ordinarily occupy their own houses. Suppose an artist occupied part of a house separately as a studio, and had agreed to be subject to certain restrictions in the use of it, as, for instance, that he must not receive visitors in it, so that he could not paint portraits there. Notwithstanding such restrictions, if he occupied it separately and used it for the purpose of his profession during the qualifying period, the terms of the section would be satisfied. The question is whether he occupied for the purpose of his profession—not for all the purposes of his profession. It seems to me that this consideration assists us greatly in construing the part of the section which defines the term "dwelling-house." The question is whether the appellant occupied this cubicle as a dwelling. If not for the purpose of dwelling in, I ask myself the question, for what purpose did he

occupy it? I think the term "dwelling" is used in the section as an antithesis to "trade, business, or profession." I concede that there appears to have been a most extensive power of interference with the use by the appellant of this cubicle. But, in order that a man may be an inhabitant occupier, he is not bound to shew a title to occupy. He may have been a trespasser, or a tenant at will, or merely on sufferance. The only question is, did he in fact occupy as an inhabitant? With regard to the question whether the subject-matter of the occupation was a dwelling-house, I concede, again, that the appellant had not the same rights as persons would have in the case of ordinary dwelling-houses. But the question appears to me to be not whether he had such rights, but whether he separately occupied part of a house as a dwelling. It seems to me that, whatever the powers of the chief constable may have been, these cubicles were the dwellings of those policemen who occupied them by sleeping in them from day to day throughout the qualifying period. I cannot see that using them as sleeping-places is anything else but occupying them as dwellings, although the occupants may not have been entitled to use them for other purposes for which people ordinarily use their dwellings. So far as it goes, I think sleeping in a place is using it as a dwelling. In point of fact, these policemen appear to have been allowed, if they liked, to take meals in their cubicles, and not to have been interfered with in the use of them in any way. There was, no doubt, the power of interfering with them; but I do not think that the existence of such a power is made by the Legislature the test. In my opinion the question is whether they did in fact occupy part of a house as a dwelling, not whether they had a right to occupy in the same manner as that in which a person occupies a "dwelling-house" in the ordinary sense of the term.

Appeal dismissed.

Solicitor for appellant: *R. White, for F. Treasure, Gloucester.*

Solicitor for respondent: *C. T. Courtney Lewis, for Langley-Smith, Gloucester.*

E. L.

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1896
Feb. 27.

[IN THE COURT OF APPEAL.]

SHEARS AND ANOTHER *v.* GODDARD.

Bankruptcy—Act of Bankruptcy—Protected Transaction—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 4, 49.

A transaction with a bankrupt which comes within the terms of s. 49 of the Bankruptcy Act, 1883, is protected by that section, although it is an act of bankruptcy.

APPEAL of the defendant from the judgment of Wright J. on an interpleader issue tried before him without a jury, in which the plaintiffs claimed as against the defendant, the trustee of a bankrupt's estate, a sum of money paid into court under the following circumstances. The bankrupt, who was a cab-proprietress, had sold the whole of her stock of horses, cabs, forage, &c., to the plaintiffs for the sum of 300*l.*, which was paid to her in cash. She immediately afterwards departed from her dwelling-house leaving various debts unpaid. The plaintiffs removed the horses and cabs and deposited them with one Ward for the purpose of being sold. They were sold accordingly, and realized the sum of 377*l.* 18*s.* A receiving order was subsequently made against the bankrupt, followed by an adjudication of bankruptcy, the act of bankruptcy alleged being that she had with intent to defeat or delay her creditors departed from her dwelling-house, and also that she had made a fraudulent delivery or transfer of her property to the plaintiffs.

The defendant, as trustee in bankruptcy, claimed from Ward the proceeds of the sale of the horses and cabs. The plaintiffs having sued Ward to recover the same, he interpleaded and paid the 377*l.* 18*s.* into court.

There was no evidence that the bankrupt had committed any act of bankruptcy prior to the sale to the plaintiffs. The learned judge found that, although the sale by the bankrupt to the plaintiffs was an act of bankruptcy, the plaintiffs had purchased the goods bonâ fide without knowledge that the bankrupt was intending to defraud her creditors, and he held that the

transaction was protected by s. 49 of the Bankruptcy Act, 1883, and therefore gave judgment for the plaintiffs. (1)

Witt, *Q.C.*, and *Muir Mackenzie*, for the defendant. The transaction in question must be void as an act of bankruptcy under s. 4 (*b*) of the Bankruptcy Act, 1883, unless it comes within the protection given by s. 49 of the Act. It is submitted that that section does not operate to protect a transaction which is void in itself as being an act of bankruptcy, but only a transaction which is valid in itself but for a prior act of bankruptcy and the doctrine of the relation back of the trustee's title to that act. The concluding words of the section shew that that is the effect of the section. It was held that the corresponding provisions in previous Bankruptcy Acts did not protect a transaction which was void in itself as being an act of bankruptcy: see per Parke B. in *Hall* v. *Wallace* (2) and *Smith* v. *Cannan*. (3)

[They also cited *Bevan* v. *Nunn* (4); *In re Clark*, *Ex parte Beardmore*. (5)]

Herbert Reed, *Q.C.*, and *Duke*, for the plaintiffs, were not called upon.

LORD ESHER M.R. The cases relied upon by the counsel for the defendant were decided under previous Bankruptcy Acts,

(1) Bankruptcy Act, 1883, s. 49: "Subject to the foregoing provisions of this Act with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Act shall invalidate, in the case of a bankruptcy, (*a*) any payment by the bankrupt to any of his creditors, (*b*) any payment or delivery to the bankrupt, (*c*) any conveyance or assignment by the bankrupt for valuable consideration, (*d*) any contract, dealing, or transaction by or with the bankrupt for valuable consideration: Provided that both the following conditions are complied with, namely—(1.) the payment, delivery, conveyance, assignment, contract, dealing, or transaction, as the case may be, takes place before the date of the receiving order; and (2.) the person (other than the debtor) to by or with whom the payment, delivery, conveyance, assignment, contract, dealing, or transaction was made, executed, or entered into, has not at the time of the payment, delivery, conveyance, assignment, contract, dealing, or transaction, notice of any available act of bankruptcy committed by the bankrupt before that time."

(2) 7 M. & W. 353.

(3) 2 E. & B. 35, at p. 39.

(4) 9 Bing. 107.

(5) [1894] 2 Q. B. 393.

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the language of which was different from that of the present Act. We have to determine what the law is on the terms of the Bankruptcy Act, 1883, as they now stand; and I do not think that for that purpose the decisions on the older statutes afford us any assistance. The 49th section of the Act was meant to protect innocent persons who have entered into bonâ fide dealings or transactions with the bankrupt for valuable consideration. It provides in the plainest terms that nothing in the Act shall invalidate in the case of a bankruptcy any such dealing or transaction, provided that two conditions are complied with, namely, that the dealing or transaction shall have taken place before the date of the receiving order, and the person with whom it was entered into shall not have had at the time of entering into it notice of any available act of bankruptcy committed by the bankrupt before that time. It seems to me clear that the present case is exactly within the words of the section construed according to their ordinary meaning. In order to construe it as suggested by the defendant's counsel, it would be necessary to import into it such an addition to the actual words used as would be entirely contrary to the proper rules of construction. The transaction was for valuable consideration, and was entered into before the date of the receiving order. The learned judge has found that the plaintiffs acted bonâ fide, and had no notice of any prior act of bankruptcy committed by the bankrupt. It does not appear, indeed, that there was any such act of bankruptcy. If the plaintiffs had had notice of any such act, or notice that the bankrupt was attempting to defraud her creditors, they would not have been acting bonâ fide, and would have been parties to a fraud on the bankrupt laws, and they would not in that case have been protected; but, having entered into this transaction innocently, they seem to me to come within the very words of the Act. It appears to me that the result of so construing the section is to do justice; whereas the result of the contrary construction would be gross injustice. That being so, I have no hesitation in saying that I think the Legislature meant what they have in plain terms said in this section; and I do not think it is material to consider what may have been decided upon the terms

of other sections in other Acts relating to bankruptcy now repealed. For these reasons I think the appeal must be dismissed.

LOPES L.J. The learned judge who tried this case came to the conclusion that, although the bankrupt was fraudulently disposing of her goods for the purpose of defeating her creditors, the plaintiffs did not know that to be so, and innocently purchased them. I think that he was quite justified upon the evidence in coming to that conclusion. It was argued that the transaction did not come within s. 49 of the Bankruptcy Act, 1883, on the ground that it was in itself an act of bankruptcy. I do not think that argument is sound. In order to determine whether it is so or not, I think we must look only at the Bankruptcy Act, 1883, of which s. 49 forms a part, and not at the language of former Bankruptcy Acts. Looking at the terms of that section, it seems clear that this case comes within it. By s. 4 of the Act a fraudulent conveyance, gift, delivery, or transfer by a debtor of his property, or any part thereof, is made an act of bankruptcy. Then by s. 49 it is provided that, subject to certain exceptions, nothing in the Act shall invalidate any conveyance or assignment by the bankrupt for valuable consideration, or any contract, dealing, or transaction by or with the bankrupt for valuable consideration, provided that it takes place before the date of the receiving order, and that the person (other than the debtor) to, by, or with whom it was made, executed, or entered into has not at the time notice of any available act of bankruptcy committed by the bankrupt before that time. It seems to me that every part of that section is complied with in this case. The transaction was for valuable consideration. It does not appear that the consideration was inadequate or that there was anything suspicious on the part of the plaintiffs. The transaction took place before the date of the receiving order. The persons with whom it was entered into had not notice of any available act of bankruptcy previously committed by the bankrupt, and could not have, for there was no such act. Certain cases decided under previous Bankruptcy Acts were cited, and in particular reliance was

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placed upon what was said by Parke B. in *Smith* v. *Cannan*. (1) I do not desire to say anything with regard to that case, because it turned upon a statute the language of which was entirely different from that of the statute which we have to construe. It may well be that the language used was altered in the present Act for the express purpose of including a case of this kind and preventing the injustice occasioned by the terms of the earlier Act. I agree that the appeal should be dismissed.

RIGBY L.J. I am of the same opinion. Two questions were raised in this case—one being a question of fact, the other a question of law. With regard to the question of fact, the judge came to the conclusion that the plaintiffs had acted in good faith, and that the transaction was an honest one so far as they were concerned, and I think that the evidence justified him in arriving at that conclusion. With regard to the question of law, it appears to me that the contention for the defendant really invites us, not merely to interpret the words of the section, but to insert into it something which would altogether alter its meaning. It seems impossible to say that the words "nothing in this Act shall invalidate," literally construed, would not include that portion of the Act which provides what acts shall constitute an act of bankruptcy. The specific exceptions contained in the beginning of the section serve to shew the absolute generality of the words that follow them. By the terms of the section a transaction for valuable consideration, such as this has been held to be, is not to be invalidated provided two conditions are fulfilled, namely, that it takes place before the date of the receiving order, and that the person with whom it is entered into has not notice of any available act of bankruptcy previously committed by the bankrupt. These conditions were fulfilled in the present case. I do not think we have a right to alter the words used as suggested, and by the words of the section as they stand protection is given to such a transaction as that now in question. With regard to the cases which have been cited, it must be observed that there is an important distinction between the phraseology of the Act on which they were decided and that of

(1) 2 E. & B. 35, at p. 39.

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the Bankruptcy Act, 1883. Under the corresponding provision of the Act of 1849 the transactions protected were to be deemed valid "notwithstanding any prior act of bankruptcy by such bankrupt committed," and in the cases relied upon it seems to have been held that this enactment only prevented a transaction from being invalidated by a prior act of bankruptcy. I do not think those decisions are of any value with regard to the construction of s. 49 of the Bankruptcy Act, 1883. That is a positive enactment in plain terms to which we are bound to give effect according to their ordinary meaning. I do not think that the section would render valid a transaction which was fraudulent on the part of the person dealing with the bankrupt. It seems to me to be necessarily involved in the terms of the section itself that the transaction in order to be protected must be a genuine transaction for valuable consideration entered into by the person who claims the protection given by the section bonâ fide, and not collusively with the debtor. But I cannot see any foundation for the contention that the Legislature did not intend to protect a transaction coming within the terms of s. 49, because but for that section it would have been rendered invalid by a previous section of the Act as constituting an act of bankruptcy.

Appeal dismissed.

Solicitor for plaintiffs: *B. Burton.*
Solicitors for defendant: *G. Reader & Co.*

E. L.

1896
Feb. 4, 5, 8, 11.

In re SEAMAN.
Ex parte FURNESS FINANCE COMPANY, LIMITED.

Bankruptcy—Mortgage of Chose in Action—Notice—Order and Disposition—Protected Transaction—Delay in making Claim—Costs—Bankruptcy Act, 1883, *c.* 52, *ss.* 44, 49.

In 1890 A. by deed assigned to a company the moneys to become due to him under a contract with the War Office to secure the payment of 30*l.* No notice of this deed was given to the War Office. In May, 1892, A. committed an act of bankruptcy, and a receiving order was made against him in August, 1892. On June 24, 1892, A. by deed assigned the same moneys under the same contract to the company to secure the payment of 74*l.*, which sum in fact included the previous 30*l.* Notice of this deed was at once given to the War Office by the company, who were not aware of the act of bankruptcy. In November, 1893, the trustee in bankruptcy rejected the claim of the company to be secured creditors, and informed them that he should shortly receive from the War Office the money due under the contract. The company took no step to assert their claim until December, 1895:—

Held, first, that the delay of two years did not under the circumstances amount to an abandonment by the company of their claim; secondly, that the notice to the War Office was equivalent to taking possession of the subject-matter of the assignment, and, coupled with the deed of June, 1892, was a dealing for valuable consideration, and therefore a protected transaction within s. 49 of the Bankruptcy Act, 1883; and, thirdly, that the company, having taken possession by their notice, could then set up both their deeds of assignment.

THIS was a motion by the above-named company claiming a declaration that the trustee in bankruptcy was a trustee for them of the moneys received by him under a contract made between the bankrupt and the War Office.

On October 29, 1890, W. Seaman, in consideration of 27*l.* then advanced to him by the company, by deed assigned to the company all sums of money then due and to accrue due to him from the War Office in respect of his services as architect under a certain contract as security for the repayment of a sum of 30*l.* on December 29, 1890. Notice of this deed was not given to the War Office.

On June 16, 1892, W. Seaman executed another deed in favour of the company, whereby, "in consideration of 15*l.* then advanced to him by the company and of the sum of

59*l.* 13*s.* 6*d.* then due and owing by him to the company upon a judgment of the Queen's Bench Division of the High Court, making together the sum of 74*l.* 13*s.* 6*d.*," he assigned to the company all sums of money then due and to accrue due to him from the War Office under the same contract as security for the payment of the 74*l.* 13*s.* 6*d.* and interest. This deed did not refer to the previous deed of October 29, 1890, but the judgment debt of 59*l.* 13*s.* 6*d.* did in fact comprise the 30*l.* due under that deed and further advances.

On June 24, 1892, the company gave notice to the War Office of the deed of June 16, 1892, who, in acknowledging the receipt of the notice, stated that the War Office did not recognise any assignments made by contractors.

On August 11, 1892, a receiving order was made against W. Seaman on a bankruptcy petition filed on May 20, 1892, grounded on an act of bankruptcy committed by him the previous day. Adjudication followed, and a Mr. Gimblett was appointed the trustee in bankruptcy with a committee of inspection.

In November, 1892, the company gave Gimblett notice of the deed of June 16, 1892, and that they claimed to be secured creditors. The trustee questioned their claim.

Negotiations for a compromise fell through, and on November 25, 1893, the company gave Gimblett notice that they claimed under both of their deeds.

On November 29, 1893, Gimblett wrote the company, refusing to admit their claim to be secured creditors, and stating that the moneys due from the War Office would be received by him shortly.

On December 27, 1893, Gimblett received about 150*l.* from the War Office, and at once wrote to the company informing them of that fact, and again stating that he did not recognise them as secured creditors. This letter did not reach the company, and they did not know he had been paid by the War Office until November, 1895, when they received from him the usual notice stating his intention to apply for release, and inclosing an account of his receipts and payments as trustee. This account shewed that the total assets realized 184*l.*, out of which

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89*l.* 15*s.* 5*d.* had been voted in a lump sum by the committee of inspection to the trustee for his remuneration and out of pocket expenses, and that the balance had been paid in solicitor's costs and other charges, and that no dividend had been paid the creditors.

The company thereupon at once applied to the Court for a declaration that they were entitled to be paid the 74*l.* 13*s.* 6*d.* due to them under the deeds of October 29, 1890, and June 16, 1892, out of the moneys received by Gimblett from the War Office, and that he held the said moneys as trustee for them.

Muir Mackenzie, for the company. This is a protected transaction within s. 49 of the Act. The company had no knowledge of the act of bankruptcy when they took the second mortgage. The notice to the War Office was equivalent to taking possession, and took the debt out of the order and disposition of the bankrupt. There is no distinction in principle between goods and choses in action: *Re Styan* (1); *In re Wright* (2); *Graham* v. *Furber*. (3)

Carrington, for the trustee. On the evidence the company had notice of the act of bankruptcy when they took the second mortgage. The delay of two years is extraordinary, and amounted to an abandonment of their claim. But, even if the company had no notice of the act of bankruptcy, s. 49 does not apply. The company are claiming under both mortgages. By the first mortgage the bankrupt parted with his interest under the contract; and in June, 1892, he could only deal with the equity of redemption. The second deed was not intended to cancel, and did not cancel, the first deed, although, for the sake of convenience the 30*l.* was wrapped up in the 74*l.* 13*s.* 6*d.*: *Smale* v. *Burr* (4); *Ramsden* v. *Lupton* (5); *Cooper* v. *Zeffert*. (6) By the first mortgage the property passed to the company, the true owners, who allowed it to remain in the order and disposition of the bankrupt until the commencement of his bankruptcy in May, 1892, when it vested in the trustee. The

(1) 2 M. D. & D. 219, 233.
(2) 3 Ch. D. 70.
(3) 14 C. B. 134.
(4) L. R. 8 C. P. 64.
(5) L. R. 9 Q. B. 17.
(6) 32 W. R. 402.

notice to the War Office was not a taking possession under the deed of October, 1890, and was not a dealing for valuable consideration within the meaning of s. 49. It is only valid, if at all, for the amount actually advanced under the second mortgage, namely, 15*l*. But, in fact, it was only notice of a document which was invalid.

Muir Mackenzie, in reply.

VAUGHAN WILLIAMS J. This is a difficult case, both on the facts and the law. I will first deal with the facts. It is admitted that the taking possession here by virtue of the notice to the War Office did not occur until after the act of bankruptcy had been committed, and therefore the creditor cannot succeed unless he brings his case within s. 49 of the Act as a protected transaction. The onus, therefore, is on the company to shew that the taking possession by giving notice to the War Office on June 24, 1892, was a dealing for valuable consideration, and without notice of the act of bankruptcy and that is why I feel such difficulty in this case. The lapse of time from November, 1893, to December, 1895, is remarkable; but under the circumstances I do not think it was extraordinary. It may very well be that the company preferred to let the trustee get the money from the War Office, and waited to see what the debtor's estate would realize for the creditors; and I cannot help thinking that in calculating the chances of success it does make a difference whether you are fighting the creditors or fighting the trustee. On the whole I do not think that the company abandoned their claim to be secured creditors, and I am of opinion that they had no notice of the act of bankruptcy at the time when they gave their notice to the War Office.

Then, as to the law. According to my mind, Maule J. accurately states the law in *Graham* v. *Furber* (1), where he says (2): "It was the intention of the Legislature by this statute to relieve such a person and to place him in as good a position, where he got back his goods before notice of an act of bankruptcy, as if he got them back before the commission of an act of bankruptcy. When he got his goods back, they were taken

(1) 14 C. B. 134. (2) 14 C. B. 134, at p. 156.

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to have been got back before an act of bankruptcy, if got back without notice of an act of bankruptcy." I think the law so stated is perfectly right. If a person by a dealing which is a protected transaction under s. 49 of the Bankruptcy Act, 1883, takes possession of goods, the doctrine of relation back ceases to have any application, and the creditor must be treated as getting possession before an act of bankruptcy is committed, or, in other words, as if no act of bankruptcy had been committed. That being so, the subject-matter of the assignment is immaterial. It makes no difference whether the subject-matter is goods or choses in action. Then what is the position of the trustee in bankruptcy here? He says the whole debt was assigned by the deed of October, 1890, and all that was left was the equity of redemption, and that the assignment of June, 1892, was only a dealing with the equity of redemption, and that the second deed was not intended to cancel, and did not cancel, the first deed, and that you must treat them as both standing together, and he relies on *Cooper* v. *Zeffert*. (1) Assume that to be so, without deciding it absolutely, namely, that the second deed was not meant as a cancellation of the first deed, if the second should go to the wall—what does it come to? He says that as the notice here was a notice under the second deed it only operates on the equity of redemption—that is, is only good for the amount actually advanced on the second deed. But if the notice is, as I hold, a taking possession of the fund, then the fact of taking possession even under a wrong title does take the fund out of the order and disposition of the bankrupt. It does determine the possession of the bankrupt. But it is said that if the claim is made under the wrong contract the notice is not a dealing or transaction for valuable consideration within the meaning of s. 49 of the Act. I do not agree to that. In my judgment, a claim for valuable consideration means a claim under which consideration moved from the bankrupt—that is, a claim not based on a mere gift by the bankrupt. If that is so, here the true owner was relying on a claim based on valuable consideration, and that not the less so because in his notice he mentioned the wrong assignment. Under the cir-

(1) 32 W. R. 402.

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cumstances, I think this book-debt was not in the order and disposition of the bankrupt, and that the company are entitled to be paid out of the moneys received from the War Office the sums actually due to them under both their deeds; but they must recoup the trustee the expenses which he has incurred in recovering the amount, which under the circumstances are not to be limited to mere law costs. He must have a reasonable allowance for his time and work; and if by the delay he has been placed in a worse position than he would have been if the claim had been made earlier, he must not suffer by it, but must be allowed as against the company any payments properly made out of the estate since December, 1893.

Solicitors for company: *Sims & Symes.*
Solicitor for trustee: *F. W. Bailey.*

H. L. F.

In re GRAYDON. *Ex parte* THE OFFICIAL RECEIVER.

1896
Feb. 3, 11, 17.

Bankruptcy — Undischarged Bankrupt — After-acquired Property — Letters Patent—Royalties — Personal Earnings — Judgment of County Court—Estoppel—Solicitor's Lien for Costs—Bankruptcy Act, 1883, *ss.* 44, 53.

The principles which underlie s. 53 of the Bankruptcy Act, 1883, with respect to the "salary or income" of a bankrupt, are also applicable to his "personal earnings." In each case it is a question of amount, and he will be allowed to retain only such a sum as is sufficient for the reasonable maintenance of himself and his family, and the residue will pass to his trustee in bankruptcy.

An undischarged bankrupt took out letters patent for an invention, and granted a licence to a company to work the patented invention at a royalty of 10*l.* per week. Two instalments of the royalty, i.e. 20*l.*, becoming payable were claimed by the trustee in bankruptcy as after-acquired property of the bankrupt. The company took out an interpleader summons in the High Court, which was remitted to a county court for decision. The county court judge held that the 20*l.* was in the nature of personal earnings and belonged to the bankrupt, and refused leave to appeal. Subsequent royalties became due, and the trustee applied to the Bankruptcy Court for a declaration that they vested in him as after-acquired property of the bankrupt:—

Held, that the judgment of the county court estopped the trustee from

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asserting that the royalties were not the personal earnings of the bankrupt, but that 5*l.* a week was a fitting sum for the reasonable maintenance of the bankrupt and his family, and that the residue passed to the trustee in bankruptcy:

But *held*, also, that the solicitor of the bankrupt had as against the trustee a first charge for his costs of creating the fund, i.e., his costs properly incurred in taking out and maintaining the letters patent and carrying through the arrangements with the company.

Semble, the royalties were not the "personal earnings" of the bankrupt.

THIS was an application by the official receiver, as trustee in bankruptcy, claiming a declaration that all royalties payable to the bankrupt in respect of a patented article called the "Great Wheel" at the Earl's Court Exhibition of 1895, under a licence dated April 14, 1894, were after-acquired property of the bankrupt, and vested in him as trustee under these circumstances.

In August, 1892, Graydon was adjudicated a bankrupt, and was still undischarged. The official receiver was the trustee in bankruptcy. In 1893 Graydon invented the "Great Wheel" and took out patents in connection therewith; and on April 14, 1894, he by deed granted to a company the exclusive licence to erect and work the "Great Wheel" within the district of the London County Council in consideration of a sum of 500*l.* cash paid down, and of a royalty of 10*l.* per week during the time the "Great Wheel" should be running.

On April 17, 1894, the official receiver gave notice to the company that he claimed all the royalties payable under the licence.

In March, 1895, the bankrupt mortgaged the patent and royalties payable thereunder in favour of his solicitor, Mr. Kimber, to secure the payment of his costs incurred in relation to the patent and otherwise, which exceeded 400*l.*

The company erected the "Great Wheel" at the Earl's Court Exhibition in the summer of 1895; and in August, 1895, 20*l.* in royalties became payable and were claimed by the bankrupt and the official receiver. Thereupon the company took out an interpleader summons in the High Court, which was remitted to the Wandsworth County Court for decision.

In October the interpleader issue came before the county

court judge, who held that the royalties were the personal earnings of the bankrupt and that the 20*l.* was to be paid to him, and refused leave to appeal.

In November, further royalties having accrued due under the licence, the official receiver now applied for a declaration as above stated.

H. Reed, Q.C., and *Muir Mackenzie*, for the official receiver. These royalties are not the personal earnings of the bankrupt; they are not the product solely of his personal skill and labour, which is the principle that governs all these cases.

[VAUGHAN WILLIAMS J. I think the county court judge was wrong in his law. As at present advised, my opinion is that these royalties are not the personal earnings of the bankrupt. But is not the trustee estopped from asserting the contrary by the judgment of the county court?]

There is no estoppel. The subject-matter of the present application is not the same subject-matter that was before the county court. This is property which has devolved on or been acquired by the bankrupt since the judgment of the county court judge. He only dealt with the two instalments that were before him, and never intended his decision to affect further royalties. He had no power to construe the licence at large, but only as to the two instalments then due. The mere fact that the same point of law arises on the document does not preclude this Court from considering and deciding it.

J. G. Butcher, for the bankrupt and Mr. Kimber. The matter is *res judicata*. There is no difference between the royalties now due and those that were before the county court judge. His judgment was a decision on the same subject-matter between the same parties, and estops the trustee from raising the same point now: *Flitters* v. *Allfrey*. (1)

[VAUGHAN WILLIAMS J. As I have said, in my judgment these royalties are not personal earnings of the bankrupt.]

It is submitted that they are. They are due in respect of the patented invention, which is the product of the bankrupt's brains and skill, and are the profits of his personal labour: *Ex parte*

(1) L. R. 10 C. P. 29.

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Vine (1); *In re Hutton* (2); *In re Shine* (3); *In re Rogers.* (4) If not personal earnings, they are in the nature of "salary or income," and the trustee can only have the surplus after provision has been made for the bankrupt's maintenance in accordance with s. 53 of the Act. Here the evidence shews that the bankrupt has no other means of subsistence than these royalties, and that they are not more than sufficient for the maintenance of himself and his family. Lastly, Mr. Kimber has a valid first charge on the letters patent and royalties under his mortgage, which he acquired in good faith and before he had notice of the trustee's title: *Cohen* v. *Mitchell.* (5) At any rate, he has a first charge for his costs of creating the fund, i.e., his costs incurred in taking out and keeping up the patent, and in carrying through the agreements with the company.

Reed, Q.C., in reply. These royalties are not "salary or income," but after-acquired property, and s. 53 does not apply. Mr. Kimber may be entitled to a first charge for his costs incurred in creating the fund, but not for his general costs, for he had notice of the trustee's claim before he took his mortgage.

Cur. adv. vult.

Feb. 17. VAUGHAN WILLIAMS J. The question in this case is whether the trustee is entitled to a declaration that certain payments in the nature of royalties for a licence to use a patented article—that is to say, a great wheel for the carriage of passengers erected at the Earl's Court Exhibition under letters patent taken out by the bankrupt since the making of the receiving order—and payable to the bankrupt under an agreement, also made since the date of the receiving order, between him and the Great Wheel Company, Limited, are payable by the company to the trustee as property which, since the commencement of the bankruptcy, has been acquired by or has devolved on the bankrupt. The bankrupt says the trustee is not entitled to this declaration, first, because the sums payable are in the nature of personal earnings, and as such do not pass to the trustee;

(1) 8 Ch. D. 364.
(2) 14 Q. B. D. 301.
(3) [1892] 1 Q. B. 522.
(4) [1894] 1 Q. B. 425.
(5) 25 Q. B. D. 262.

secondly, the bankrupt says that in prior litigation between him and the trustee, namely, on the trial of an interpleader issue remitted from the High Court to the county court, it was decided that the sums thus payable to the bankrupt were in the nature of personal earnings, and did not pass to the trustee, and that the trustee is estopped by that decision from asserting the contrary. I will deal first with the point of estoppel. In my judgment, if this question was in issue between the bankrupt and the trustee in the county court, and was decided between the parties, the trustee would be estopped by the decision. But I do not think that it is proved that this point was decided in the county court. The sum of money as to which the interpleader issue was raised was a sum of 20*l.*, two early instalments of the royalties payable to the bankrupt. Now it seems to me, on the authorities, that it is not true to say that no personal earnings of the bankrupt after bankruptcy pass to his trustee. The authorities are not very clear; but I think that the balance of the authorities (see *Wadling* v. *Oliphant* (1), and cases there cited) shews that it is only the personal earnings reasonably necessary for the maintenance of the bankrupt and his family which do not pass to the trustee. This is in accordance with the principles which underlie s. 53 of the Bankruptcy Act, 1883, with regard to appropriation of a portion of salary or income. Now this being so, it seems to me that the county court judge did not decide anything more than that the 20*l.* in question was not more than was necessary for the reasonable maintenance of the bankrupt—that is to say, that even assuming the county court judge to have decided that the sums payable were in the nature of personal earnings, no estoppel arises as to the quantum of future earnings necessary for the maintenance of the bankrupt. That the decision of the county court judge was given in reference only to the amount in issue seems to me the fair inference from his observations when asked for leave to appeal. I also think the fair inference from his judgment is that he did decide the sums in question were in the nature of personal earnings, and that the trustee is estopped from denying this to be the nature of the payments when made. I shall not,

(1) 1 Q. B. D. 145.

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therefore, go into this question, but merely consider the question of quantum. I think that 5*l.* a week is a fitting sum for the bankrupt to retain as reasonable maintenance for himself and his family. The residue will pass to the trustee, but there must first be deducted from the sums payable the amounts due to Mr. Kimber for costs of creation of the fund. The charge of Mr. Kimber for his general costs seems to me to be a charge given after the trustee had intervened, and after Mr. Kimber had knowledge of his intervention; but Mr. Kimber shall have an inquiry in chambers as to this, if he chooses. I think the bankrupt ought to have the costs of this motion out of the fund, as the trustee has asked for more than he was entitled to. And as the company have been brought here by the trustee, he must pay their costs.

Solicitor for trustee: *R. Davies.*
Solicitor for bankrupt: *E. Kimber.*
Solicitors for company: *Hasties.*

H. L. F.

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Jan. 15, 16.

HUNTINGTON *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Conveyance on Sale—Equitable Mortgage—Foreclosure—Conveyance by Mortgagor under Foreclosure Order—Ad Valorem Duty—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 57.

Where an equitable mortgagee obtains an order absolute for foreclosure under which the mortgagor is directed to execute, and does execute, a conveyance of all his estate and interest in the property to the mortgagee, the conveyance is a "conveyance on sale" within the meaning of s. 54 of the Stamp Act, 1891, and is chargeable with ad valorem duty under the head "Conveyance or transfer on sale" in the first schedule to that Act.

CASE stated by the Commissioners of Inland Revenue under the Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 13.

The instrument presented for the opinion of the commissioners was dated March 26, 1895, and was made between Alexander Fletcher Knox and William Ernest Taylor of the first part, James Thomson of the second part, and Joseph Huntington of the third part, and was a conveyance to the

said Joseph Huntington of certain property in Liverpool, of which he was a mortgagee, freed and discharged from all right or equity of redemption. From the recitals contained in the instrument the following facts appeared. The property in question had, by an indenture of September 30, 1890, been mortgaged by the said James Thomson to the said Alexander Fletcher Knox and William Ernest Taylor to secure 1000*l.* and interest; and the said sum and interest had long since been paid off, and the title-deeds relating to the property had been returned to Thomson, but no re-conveyance of the property had been executed. On June 26, 1893, the title-deeds of the property had been deposited by Thomson with Huntington by way of equitable mortgage to secure the sum of 1680*l.* and interest. On June 14, 1894, a judgment was obtained in the Chancery Division in an action of *Huntington* v. *Thomson*, by which it was declared that Huntington was a mortgagee of the property, and it was ordered that an account should be taken of the amount due to him for principal and interest and costs; and it was declared that if default were made by Thomson in payment of all sums certified to be due to Huntington within six calendar months after the date of the district registrar's certificate, Huntington would be entitled to the property free from all equity of redemption, and to have an absolute conveyance thereof accordingly. By a certificate dated June 29, 1894, the district registrar certified that there was due to Huntington for principal, interest, and costs the sum of 1784*l.* 13*s.* 11*d.*, which would be increased on December 29 then next to 1825*l.* 9*s.* 5*d.* Default was made by Thomson in payment of the sum of 1825*l.* 9*s.* 5*d.*, and by an order of the Chancery Division dated February 16, 1895, it was ordered that Thomson should stand absolutely debarred and foreclosed from all equity of redemption in the property, and should execute an absolute conveyance of all his estate and interest therein to Huntington. It had been agreed that Knox and Taylor should concur in the conveyance. Neither of the two orders of Court had been stamped with any ad valorem or other stamp duty under the Stamp Act, 1891.

The commissioners were of opinion that, inasmuch as the

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property referred to in the instrument, and by the said orders directed to be conveyed, was so ordered to be conveyed by reason of the non-payment of the said debt of 1825*l.* 9*s.* 5*d.* by Thomson to Huntington (which debt was, in conformity with the order of June 14, 1894, to be considered as a charge upon the said property), the property was conveyed to Huntington in consideration of the debt of 1825*l.* 9*s.* 5*d.* due by Thomson to Huntington within the meaning of s. 57 of the Stamp Act, 1891, and that, by reason of such section, the instrument was a conveyance on sale within the meaning of s. 54 of the said Act, chargeable with ad valorem duty under the head "Conveyance or transfer on sale" in the first schedule to the said Act; and that, inasmuch as the property was, at the date of the said order, subject to and charged with the payment of the said sum of 1825*l.* 9*s.* 5*d.*, this sum must, by virtue of s. 57, be deemed to be the consideration in respect whereof the ad valorem duty was chargeable. They accordingly assessed upon the instrument the duty of 9*l.* 5*s.*, being the ad valorem duty of 5*s.* for every 50*l.* of the said sum of 1825*l.* 9*s.* 5*d.*, and the instrument was stamped in conformity with the assessment.

The questions for the opinion of the Court were, whether the instrument was chargeable with the duty of 9*l.* 5*s.* in accordance with the assessment, and, if not, with what duty it was chargeable.

J. E. Bankes, for the appellant. The instrument does not require to be stamped as a conveyance on sale, the substance of the transaction not being a sale at all. It did not operate to transfer or vest in a purchaser any property, or estate or interest in property, within the meaning of s. 54 of the Stamp Act, 1891. (1) Under the order of February 16, 1895, the mortgagor ceased to have any interest in the property which he could convey to anybody; the subsequent deed of convey-

(1) By s. 54 of the Stamp Act, 1891 (54 & 55 Vict. c. 39), "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction."

ance divested him of nothing: it merely worked out the order of the Court. If the instrument operated only to vest the bare legal title in the person who already had the entire beneficial interest, it is liable to a 10*s.* stamp only, and not to an ad valorem stamp: *Anderson* v. *Commissioners of Inland Revenue.* (1) But, assuming that the transaction did amount to a sale within the meaning of s. 54, the property was not conveyed to the appellant in consideration of any debt due to him within the meaning of s. 57 of the Act. (2) The instrument did not necessarily operate to discharge the mortgagor from the mortgage debt; if the value of the property were insufficient to satisfy the debt, the mortgagee might have recourse to other remedies for the balance; but this would open the foreclosure: *Lockhart* v. *Hardy.* (3) In any event, the full amount of the debt cannot be treated as the consideration, which cannot exceed the actual value of the property, and may be much less than the debt. [He also cited *Marshall* v. *Shrewsbury* (4); *Denn* v. *Diamond* (5); *Foster* v. *Commissioners of Inland Revenue.* (6)]

The Attorney-General (*Sir R. E. Webster, Q.C.*), (*Danckwerts* with him), for the respondents. The instrument was a conveyance on sale within the meaning of ss. 54 and 57 of the Stamp Act, 1891. Where a legal mortgage is foreclosed, the order itself vests the ownership and the beneficial title to the land for the first time in the person who was previously a mere incumbrancer, no conveyance being requisite: *Heath* v. *Pugh* (7), per Lord Selborne L.C.; but in the case of an equitable mortgage the foreclosure order has to be supplemented by a conveyance from the mortgagor to the mortgagee, which transfers to,

(1) 6 Court Sess. Cas. 4th Series, 56.

(2) By s. 57 of the Stamp Act, 1891, "Where any property is conveyed to any person in consideration, wholly or in part, of any debt due to him, or subject either certainly or contingently to the payment or transfer of any money or stock, whether being or constituting a charge or incumbrance upon the property or not, the debt, money, or stock is to be deemed the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable with ad valorem duty."

(3) 9 Beav. 349; 15 L. J. (Ch.) 347.

(4) L. R. 10 Ch. 250.

(5) 4 B. & C. 243.

(6) [1894] 1 Q. B. 516.

(7) 6 Q. B. D. 345.

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and vests in, the latter the ownership and beneficial title; it transfers the fee simple as effectually as an ordinary conveyance upon a sale of land, and is liable to the same ad valorem duty. A conveyance on sale includes instruments by which property passes for that which is, or is to be taken as, a monetary consideration, although the transaction may not be a sale in the popular sense of the word: *Foster* v. *Commissioners of Inland Revenue.* (1) Here there was an actual transfer of property for a consideration which must be taken to be a monetary consideration. By the transaction the mortgagor was released from the mortgage debt, or at any rate from a portion of it equivalent to the actual value of the property; it matters not that in a certain contingency the foreclosure might have been reopened; the transaction was complete. If the debt itself was not the consideration, the release of the equivalent portion was a sufficient consideration to satisfy the language of s. 57. [He also cited *Attorney-General* v. *Worrall* (2); *Great Western Ry. Co.* v. *Commissioners of Inland Revenue* (3); *Furness Ry. Co.* v. *Commissioners of Inland Revenue* (4); *Scottish Equitable Life Society* v. *Commissioners of Inland Revenue* (5); *City of Glasgow Bank* v. *Commissioners of Inland Revenue.* (6)]

Bankes, in reply.

WRIGHT J. This case is one of some difficulty, and is one as to which I have not formed a very confident opinion, but on the whole I think that the Crown is entitled to judgment. The principal question, which depends upon ss. 54 and 57 of the Stamp Act, 1891, is whether this instrument amounts to a conveyance on sale within the meaning of s. 54; there is a further question of the amount upon which duty ought to be paid, as to which I do not think, looking at what is contained in the case, that the Crown is altogether entitled to succeed.

As to the first question, s. 54 says, "the expression 'conveyance on sale' includes every instrument . . . . whereby any property"—I omit the words which to my mind are immaterial—

(1) [1894] 1 Q. B. 516.
(2) [1895] 1 Q. B. 99.
(3) [1894] 1 Q. B. 507.
(4) 33 L. J. (Ex.) 173.
(5) 32 Scottish L. R. 77.
(6) 8 Court Sess. Cas. 4th Series, 389; 18 Scottish L. R. 242.

" or any estate or interest in any property upon the sale thereof is transferred to or vested in a purchaser," &c. This document is clearly an instrument whereby property, or an estate or interest in property, is transferred to a purchaser, unless indeed anything turns on the word " purchaser." I do not think that any question worth consideration turns on that word; the only question is, therefore, whether the transfer was a transfer of property or of an interest in property " upon the sale thereof." It seems to me that the transaction in the present case, taken as a whole, does amount to a sale within the meaning of the section. The root of the whole matter is in a contract of equitable mortgage, which is worked out by the Court in accordance with consequences which the law attaches to such a contract in certain declared events; I think, therefore, there is here a succession or transfer—it matters little which word is used—resulting from the contract, and made for monetary consideration; where that is the case, there is a sale, which is not the less a sale because the contract, as applied to the events which have happened, is worked out by or under the order of the Court. Then comes the question whether this was an instrument " upon the sale " of property. It is argued for the appellant that the sale, if any, took place by the order of the Court itself, and not by virtue of this conveyance, which followed upon the order of the Court, and was, as is suggested, a separate transaction. I do not agree with that contention. The words " upon the sale thereof " do not appear to me to be limited to any particular part of the transaction of sale. A conveyance is a necessary part of the action of the Court when an equitable mortgage is foreclosed, and I think that a conveyance executed under the order of the Court may properly be held to be " upon the sale " of the property; and the two together, the order and the conveyance, turn what was in equity (and now in law) a mere security into an absolute legal title; and if there is consideration for that, s. 54 applies.

What, then, was the consideration? It seems to me there are two answers to that question: one is that, looking at the transaction as a whole, as a transaction following from the original contract, the money which was advanced on equitable

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mortgage may be regarded as the consideration for which the ultimate sale following from that contract of equitable mortgage was effected. But if that is not so, I think that s. 57 shews us what was the consideration. That section says that where any property is conveyed to any person in consideration wholly or in part of any debt due to him, the debt is to be deemed to be the whole or part, as the case may be, of the consideration in respect whereof the conveyance is chargeable. I think, if it is necessary to so hold, that the section makes the debt a consideration; it makes the debt, which to a certain extent is released by the foreclosure and sale, in a sufficient sense a consideration to enable us to regard the transaction as a whole as a sale.

Then comes the question whether the right amount of duty has been claimed by the Crown. I do not think that the whole amount of the debt can be the right measure of what the duty ought to be charged upon. My brother Kennedy has gone into that part of the case more fully than I have done, and has explained his views upon it to me, and I concur with him that it would not be right that the assessment should stand for the full amount. What the amount ought to be may be a difficult matter to settle, but I think that it ought not to exceed the value of the property. (1)

KENNEDY J. I have come to the same conclusion, though I confess with considerable hesitation; and though my reasons do not substantially differ from those of my brother Wright, I will, as I feel so much doubt upon the matter, shortly state the grounds upon which I have come to a conclusion in favour of the Crown. The question is whether this instrument should be stamped as a conveyance on sale. There are various heads of conveyances in the Stamp Act, 1891: there is a conveyance on sale; there is a conveyance in the case of a mortgage; there is a conveyance on other occasions. The position of things is

(1) The Attorney-General intimated that the stamp duty was only charged upon the value of the property, and that in cases where a question was raised as to the sum upon which the duty was payable it was the practice of the Inland Revenue to inquire into the value of the property, but that no such question had been raised in the present case.

shortly this. Leaving out all reference to the earlier dealings with the property as between Thomson on the one hand, and Knox and Taylor on the other, there had been an equitable mortgage by deposit of title deeds by Thomson to Huntington; then, in 1894, proceedings were taken in the Chancery Division by the equitable mortgagee, who ultimately obtained a foreclosure order by which it was ordered that Thomson should stand absolutely debarred and foreclosed from all equity of redemption in the property, and should execute an absolute conveyance of all his estate and interest to the mortgagee: that is, as I understand, the usual and proper form of order where the mortgage is an equitable mortgage only. It may not be unimportant to observe that in the case of a legal mortgage nothing beyond a foreclosure order is needed in order to perfect the title of the mortgagee, whereas in the case of an equitable mortgage there must be, not only a foreclosure order, but also an order for the execution by the mortgagor of a conveyance to the mortgagee. The question, as it seems to me, therefore is this: there being undoubtedly a conveyance executed under the order of the Court, and giving, according to the judgment of Lord Selborne in *Heath* v. *Pugh* (1), a real value to the person in whose favour it was made, is that conveyance a conveyance on sale? Looking at the judgment of Lord Selborne, I cannot help thinking that it is unsound in point of law to say that the mortgagee did not get anything by the conveyance; he gets that which Lord Selborne, quoting the judgments in earlier cases of Lord Hardwicke, Sir W. Grant, and Sir L. Shadwell, calls as being in effect "a vesting of the ownership of, and the beneficial title to, the land for the first time in the person who previously was a mere incumbrancer." A conveyance is needed in the present case for the purpose of giving to Huntington that which is described in the language I have just quoted; it is a conveyance, therefore, of something which is valuable by the order of the Court: is it any the less a conveyance on sale within the meaning of the Stamp Act? While admitting that the question is not free from doubt, it seems to me that without going back to the earlier question—that is, the

(1) 6 Q. B. D. 345.

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Kennedy J.

question as to the effect of the earlier contract to which my brother Wright has referred—there is here a conveyance by which a valuable interest is conveyed from Thomson to Huntington.

Then is there a consideration for that? There is undoubtedly a transfer. Is it a transfer by way of gift? Is it a transfer of some anomalous kind? Ought it to be treated, for the purpose of the provisions of the Stamp Act, as a conveyance on sale? On the whole it appears to me that, if looked at logically, it ought to be so treated. What is the consideration passing to Thomson? It is this: that by reason of that conveyance he, the person conveying, gets the satisfaction, at any rate, of an equivalent portion of the old debt, which, under s. 57, may be a consideration in a case like the present. It is to be observed that the section itself refers to it as one of the possible forms of consideration in the words "where any property is conveyed to any person in consideration wholly or in part of any debt due to him," and the effect of this conveyance under the foreclosure order, as I understand it, is that if there is any further right as regards the debt secured by the equitable mortgage, that is, by the deposit of deeds, it is a right confined to the excess, that is to the claim (if any) of Huntington for the amount of his loan beyond the value of the mortgaged property. I have had the opportunity of consulting one or two of the authorities in equity, and they seem to warrant that conclusion: I need only refer to *Lockhart* v. *Hardy* (1), where the question is treated as settled, and from which decision it seems clear that Huntington having got this conveyance could not make a further claim upon the estate against the person who had conveyed it to him except for the balance of his loan. If that is so, the effect of the conveyance is this: on the one hand, conveyance of the property; on the other, satisfaction of an equivalent portion at any rate of the debt. But upon the authority of *Lockhart* v. *Hardy* (1) it seems clear that the whole matter may be re-opened; so that if Huntington after getting this conveyance set on foot any claim for the unsatisfied balance (if any) of his debt, it would be open for Thomson to redeem; and if by any chance at the time that Huntington brought forward his claim for the

(1) 9 Beav. 349; 15 L. J. (Ch.) 347.

balance he had put it out of his power to re-transfer the property which he had got by the conveyance, then, as I understand the rule and practice in equity, he would be debarred from prosecuting his claim for the unsatisfied balance of the mortgage debt. In other words, if he chose to pursue any remedy for the balance of the debt after having disabled himself from re-conveying the property conveyed to him by this instrument, equity would refuse to recognise any such claim by him. The common case of course would be where the mortgagee, having got his title by a conveyance such as this, has subsequently alienated the estate by sale; if he has done so, the whole relations of mortgagor and mortgagee are held in equity to be at an end, and the mortgagee has no remedy as to the balance of his debt. Subject, however, to what I have pointed out, the right to recover the balance still remains in the mortgagee, notwithstanding the conveyance. In any case, however, it seems to me that there has been pro tanto a satisfaction of an equivalent portion of the debt, which is a gain to the person who conveys—that is, to the mortgagor. If that is so, it appears to me that there was here a debt which, at any rate in part, may be said to be the consideration for this conveyance; and in that case, although the conveyance is entered into compulsorily under the order of the Court, it seems to me that a transfer of the title to the property is effected by it—a transfer for a consideration which, looking at the other provisions of the Stamp Act, ought to bring it within the 57th section. For these reasons I think that judgment should be entered for the Crown.

Judgment for the respondents.

Solicitors for appellant: *Norris, Allens & Chapman, for J. Labron Johnson, Liverpool.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

W. J. B.

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Jan. 16.

CLIFTON COLLEGE, Appellants *v.* TOMPSON (Surveyor of Taxes), Respondent.

Revenue—House Duty—School Buildings—Head Master's House—Occupier— 48 *Geo.* 3, *c.* 55, *Sched. B*—14 *&* 15 *Vict. c.* 36.

A company owning a public school, founded by charter, was assessed to inhabited house duty in respect of land and school buildings, and a head master's house, garden, and stables, after allowing for the value of ten out of eleven acres, which were occupied as a garden and playground. The premises were used for the purposes of the school. The head master's house was held by him under a lease, which would determine if he ceased to hold his office. He resided in the house and kept boarders there for profit, but was not bound to reside in it.

On a case stated under the Taxes Management Act, 1880:—

Held, that the head master, and not the company, was the occupier of the head master's house, and that the rest of the school buildings could not be treated as inhabited dwelling-houses, and therefore the assessment was wrong.

Case stated for the opinion of the Court pursuant to the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59.

The secretary to the Clifton College appealed, on behalf of the Clifton College, against an assessment of 1978*l.*, for the year ending April 5, 1894, under (1) inhabited house duty, upon the college. (2)

(1) *Sic* in case as stated.

(2) 48 Geo. 3, c. 55, Sched. B: "A schedule of the duties made payable on all inhabited dwelling-houses throughout Great Britain, according to the value thereof, and of the offices and lands to be charged therewith.

"For every such inhabited house which, with the household and other offices, yards and gardens therewith occupied and charged, are or shall be worth the rent hereinafter mentioned by the year, there shall be charged the yearly sums following. . . . .

"Rules for charging the said last-mentioned duties.

* * * *

"2. Every coach-house, stable, brew-house, wash-house, laundry, wood-house, bakehouse, dairy, and all other offices, and all yards, courts, and curtilages, and gardens, and pleasure-grounds belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house; provided no more than one acre of such gardens and pleasure-grounds shall in any case be so valued."

The duties imposed by this Act were repealed by 4 & 5 Will. 4, c. 19, s. 1; but the rules for charging are kept in force by 14 & 15 Vict. c. 36.

In the rate the description of the property was college, sanatorium, land, and buildings; owners, Clifton

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The foundation of Clifton College, where some 600 boys are educated, consists (1) of a charter, bearing date March 16, 1877.

The buildings assessed comprise the school itself, the head master's house and offices, in which the head master and his family reside, and sixty-seven boys are boarded, a chapel, library, sanatorium, gymnasium, racket courts, fives courts, swimming-baths, carpenter's shops, museum, and other buildings, and eleven acres of garden and playground, all within one boundary. The head master's house is not joined to the other buildings, though they are, with the exception of the sanatorium, near to it; the latter is at the further end of the playground. There is a racket court on the other side of Guthrie Road.

With the exception of the head master's house and the sanatorium, no one sleeps or resides upon, or otherwise uses, any of the school buildings during the nighttime, and they are used during the daytime alike by all the boys at the college, whether boarders or day boys. Of the 600 boys at the college about 187 are day boys.

The surveyor of taxes contended that the whole of these buildings, with the offices, yards, and one acre of the garden and playground, are chargeable with inhabited house duty, under 14 & 15 Vict. c. 36, as an inhabited dwelling-house.

The appellants contended that the school premises (except the head master's house above mentioned, and one acre of garden) were exempt from the inhabited house duty, as coming within the exemption in the Inhabited House Duty Act, 48 Geo. 3, c. 55, Sched. B, case 4, "Any hospital, charity, school, or house provided for the reception or relief of poor persons"; and, further, that the last-named Act was an Act to charge dwelling-houses and buildings in connection therewith required for the purposes of the inhabitants of the dwelling-house, and does not include the buildings described as above forming part of the school premises, and, further, that no profit arising from

College Company; occupiers, Clifton College; secretary, W. D. L. McPherson; and house, garden, and stable; owners, Clifton College Company; occupier, Michael G. Glazebrook (the head master).

(1) *Sic* in case as stated.

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the college is payable to any individual person, but any profit that is made is used for the improvement and advancement of the college and its interests.

Appellants referred to *Commissioners for Special Purposes of Income Tax* v. *Pemsel* (1) in support of their argument that the Clifton College is a charity school.

There are several masters' houses near to the college, in which a large number of boys are boarded, and fees are paid for their schooling. These houses are separately assessed to the inhabited house duty, the boarding charges, as fixed by the bye-laws and regulations, being for each boy of thirteen years or upwards 72*l.* per annum, and for each boy under the age of thirteen years 60*l.* per annum, and in addition to this there are charges for extras, such as gymnasium, laboratory, baths, and workshops, and also for subscriptions to the games and publications.

Having regard to the facts of the case, and the statutes, and in view of the decision in *Governors of Charterhouse School* v. *Lamarque* (2), the commissioners confirmed the assessment of the inhabited house duty, after allowing 100*l.* as the value of ten of the eleven acres occupied as the garden and playground.

The question for the opinion of the Court was, whether the aforesaid school buildings were liable to the inhabited house duty or not. (3)

Cohen, Q.C. (*A. T. Lawrence* with him), for the appellants, referred to the two decisions which are mentioned in the above case, and also *Cheape* v. *Kinmont.* (4)

The Court called upon

The Solicitor-General, Sir R. B. Finlay, Q.C. (*Danckwerts* with him), for the respondent. The college is liable to be assessed in respect of the buildings referred to in the case. The

(1) [1891] A. C. 531.

(2) 25 Q. B. D. 121.

(3) It appeared from the documents annexed to the case that the head master was not bound to reside in his house; but one of the terms of the lease under which he held the house was that if he ceased to hold the office of head master the lease should come to an end.

(4) 2 Tax Cases, 418; 16 Court Sess. Cas. 4th Series, 144; S.C. nom. *Cheape* v. *Commissioners of Inland Revenue*, 26 Scottish L. R. 103.

other buildings are occupied with the head master's dwelling-house, and the terms of his tenure of his house are that he retains possession only so long as he remains head master; therefore the college, not the head master, is the occupier. [He referred to *Riley* v. *Read* (1); *Corporation of Glasgow* v. *Inland Revenue* (2); *Lambton* v. *Kerr*. (3)]

Cohen, Q.C., was not heard in reply.

WRIGHT J. In this case the head master is not bound to reside in the house which he does occupy, and there is nothing to shew that his occupation is in any degree less than the occupation of any ordinary tenant, except in one respect, and that is that, under the lease which has been given to him, the lease will come to an end if he ceases to hold the office of head master; in all other respects he seems to us to be in the fullest sense in the occupation of the house. That being so, it seems to me that he is the person taxable for his house under these Acts, and if he is the person taxable for his dwelling-house, he is not, under rule 2 of Sched. B of the Act of 1808 (4), assessable for anything that is not occupied with it. I do not think it can be said in any sense that he occupies the various premises outside his own house, as to which questions in the case arose: the chapel, library, sanatorium, gymnasium, racket courts, fives courts, swimming-baths, museums, and so forth; there is nothing in the case to shew that those belong to and are occupied with the master's dwelling-house.

Then, that being so, the only ground upon which the Crown could succeed would be, that the college is assessable for the remainder of the premises, as being a dwelling-house, or as including some other dwelling-house, to which the rest is attached, and occupied with that dwelling-house. But the premises which I have just mentioned do not appear to me to be capable of being treated as inhabited dwelling-houses at all. Boys do not dwell in or inhabit any class-room or gymnasium, or any of these other places; they neither dwell there nor

(1) 4 Ex. D. 100.

(2) 8 Court Sess. Cas. 4th Series, 17; 18 Scottish L. R. 1.

(3) [1895] 2 Q. B. 233.

(4) 48 Geo. 3, c. 55.

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Wright J.

inhabit there; nor does anybody else, so far as the case shews. Then, in addition to that, on the second point to which I have adverted, it seems to me that the weight of authority in this country is to the effect that nothing is inhabited as a dwelling-house for the purposes of these Acts unless someone sleeps there. It is not necessary for us to express any opinion upon that point, but that seems to me on the whole to be the conclusion to which the authorities in this country, as distinguished from Scotland, lead. There is one other point. Even if the college were to be treated as occupied with the master's house in this case, I should hesitate long before I held that all the other places enumerated in the case came within rule 2 of Sched. B and were of the same nature as a "coach-house, stable, brewhouse, wash-house, laundry, woodhouse, bakehouse, dairy, and all other offices and all yards, courts and curtilages, &c." It is not necessary to decide that, and it may arise, I understand, in the *Charterhouse Case* (1); but it is a matter of great difficulty, that is to say, it would be a matter of great difficulty to hold that to my mind. It does look at first sight as if the marginal note correctly represented for once what the sections refer to—namely, household offices. As regards this case I think the appeal must be allowed with costs.

KENNEDY J. I agree, and for the same reasons.

Judgment for the appellants.

Solicitors for appellants: *Thomas White & Sons, for Stanley, Wasbroughs & Doggett, Bristol.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) Next page.

P. B. H.

THE GOVERNING BODY OF CHARTERHOUSE SCHOOL, Appellants; *v.* GAYLER (Surveyor of Taxes), Respondent.

1896 Jan. 16, 17.

Revenue—House Duty—School Buildings—Head and Assistant Masters' Houses—Occupier—48 *Geo.* 3, *c.* 55, *Sched. B*—14 & 15 *Vict. c.* 36.

The governing body of a public school was assessed to inhabited house duty, as occupier, in respect of the houses of the head master and assistant masters, and the chapel and other school buildings, which were built for the use of the school, and were used by all the boys at the school, whether boarders in the masters' houses or not. The head master paid no rent, but was bound by the terms of his appointment to reside in his house, and took in boarders. The assistant masters paid rents less than the full annual value of their houses, and took in boarders, and resided in their houses as house masters.

On a case stated under the Taxes Management Act, 1880:—

Held, that the head and assistant masters did not occupy their houses as servants or agents of the governing body, so as to make their occupation the occupation of the governing body, but were themselves the occupiers of their respective houses, and that the other school buildings were not inhabited dwelling-houses, and therefore the assessment was wrong.

Case stated for the opinion of the Court pursuant to the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59.

The assessment against which an appeal was heard before the General Commissioners, was in respect of a charge of 3000*l.* for the year 1890–1891 for inhabited house duty, made upon the governing body, in respect of certain of the buildings at Godalming known as Charterhouse School.

A list of the buildings which form the subject of the assessment is subjoined, and in such list certain particulars relating to each of such buildings are given.

Each of such buildings came into existence wholly or primarily for the purposes of the school as now carried on.

List.

A. The premises known as the head master's house. This house was built in 1871–1872 by the governors of Charterhouse pursuant to the Charterhouse School Act, 1867 (30 & 31 Vict. c. 8, private). It is the residence of the head master, who holds

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it upon the terms of art. 28 of the school statutes. (1) It comprises the private residence of the head master and his family, and boarding accommodation for about sixty boys.

B. The premises known as Mr. Evans' house. This house answers to the same description as A, except that it is the residence of Mr. Evans, one of the assistant masters, as such, who holds it pursuant to the regulations, and upon the terms of the following resolution :—

Feb. 5, 1873. At a meeting of the governing body of Charterhouse School, it was resolved that the occupier of the larger boarding-house now on the school property at Godalming be required to pay the sum of 60*l.* per annum by way of rent for such house, and that the occupier of the smaller boarding-house now on such property be required to pay the sum of 50*l.* per annum by way of rent for such house. .

The sum paid does not represent the full annual value of the house. There are about sixty boys boarded in this house.

C. The premises known as Mr. Davies' house.

This house answers to the same description as A, except that it is the residence of Mr. Davies, another of the assistant masters, as such, who holds it pursuant to the same regulations, and the same resolution, as in the case of B. There are about sixty boys boarded in this house.

The head master's house adjoins at its south-east corner Mr. Evans' house; but there are no doors or openings of communication between the two houses. Mr. Evans' house, at its south-eastern portion, abuts against Mr. Davies' house; but there is a party-wall between the two houses, in which there is no door or opening. There are two areas at the basement level, open to the sky, between portions of Mr. Evans' and Mr. Davies' houses, which areas are used in common by both houses, with several doors from each house entering thereto.

A room on the ground level of Mr. Evans' house is used as an armoury by the boys of the school volunteer corps.

Another room adjoining the armoury is used as a general class-room, entered from Mr. Evans' house.

A third room, also on the ground level of Mr. Evans' house,

(1) The head master paid no rent, but was bound to reside in the house.

is used by the masters as a reading or common room, entered by a passage from the covered way running between Mr. Evans' and Mr. Davies' houses. This room communicates by an inner door with Mr. Evans' house.

The covered way referred to commences at its western end at the chapel cloister, passes for a length of some fifty-five feet under the upper part of Mr. Evans' house, and continues eastward between Mr. Evans' and Mr. Davies' houses. Doors to both houses are in this covered way.

The chapel is separated from Mr. Evans' house by the chapel cloister, the east wall of the chapel being the west wall of the chapel cloister; but there is no communication between the chapel cloister and the chapel.

The entrance to the chapel is on the south side.

The three houses are connected at the ground level by covered ways or cloisters, which are continued to the several class-rooms, hall, and library.

The cloisters against the houses are open on one side to the quadrangle or grounds.

The covered way between Mr. Evans' and Mr. Davies' houses is open at the ends.

The covered ways or cloisters continuing to the class-rooms, hall, and library, are open on both sides to the quadrangle or grounds.

The masters reside in their respective houses in the character of house masters.

The masters who are shifted from an outside house to a school house do not necessarily take their boys with them, but may be required to take with the house the boys who have (previously to their being asked to take such school house) been therein, and whom they find there; but the masters occupying school houses are liable to the risks, and entitled to the profits, of their houses.

The whole of the properties and buildings of the school were rated and included in one valuation for the purposes of the poor-rate, with the exception of the sanatorium and one of the lodges, which are separately rated, and charged accordingly. On the other hand the masters' houses only are separately

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charged to income tax under Sched. A, in accordance with the second paragraph of No. VI. of Sched. A, s. 61, of the Income Tax Act, 1842. (1) The other buildings have never been in fact charged to income tax, exemption having been claimed as being a public school.

D. The Chapel.—This was built by the governors, and completed in 1874, as a place of worship for the boys and staff of the school, which then contained about 180 boys. It is a consecrated building, used only as a chapel, and seats between 600 and 700.

It, and also the buildings lettered E to R inclusive, were built for the use of the school generally, and are so used, but are not used exclusively by the boys in houses A, B, and C.

E. The Large Hall.—This was built by the governors in 1882, to meet the requirements of the whole of the boys at the school, including day boys. It is used for all gatherings of the whole school for prize givings, lectures, entertainments, and the like. There are class-rooms round it, with access only from the outside.

F. The Library.—This was built by the governors in 1871–1872, and was originally intended for and used as a school-room.

A covered passage, or cloister No. 3, leads from cloister No. 4 to the library.

G. The Old Class Rooms.—These were built by the governors in 1874. Two covered passages or cloisters, Nos. 5 and 7, lead from the block to the entrances of these class-rooms.

H. The Laundry was built by the governors in 1872, to serve as a laundry for the three houses A, B, and C, and such other houses as might be able to make use of it. It is at present used for three out of the five houses owned by the governors—namely, A, B, and C, and for four other boarding-houses which are outside the school grounds.

I. Science Rooms for the teaching of chemistry and physics, with laboratories, and for no other purpose.

J. Museum, Large Theatre, and Class Rooms, used only for the purposes signified by the names by which they are designated.

(1) 5 & 6 Vict. c. 35.

K. Carpenter's Shop, partly used by the boys, and partly by the carpenter.

L. Drawing School.

M. Sanatoriums (two).

N. Swimming Bath.

O. Racquet Courts.

P. Lodges (three).

R. Some other small Buildings and Stabling (five).

S. There are eight other houses, occupied or owned by other masters as Boarding Houses, the boys in such boarding-houses being equally with those in the houses A, B, and C, members of the school. These boarding-houses are situated outside the school grounds, and do not form part of this assessment.

The buildings selected for and comprised in the assessment now in question are those within the grounds originally acquired for the school under the Public Schools Act, 1868. (1)

The school as now constituted could not be carried on without using most of the buildings D to R for the purposes of the whole school. The buildings G to S are under the care of the head master, and are used for such school purposes as he thinks fit.

The appellants contended that the three houses A, B, and C were separate inhabited dwelling-houses, and that they only, with their respective household offices, were separately and distinctly liable to the duty. Alternatively, they contended that if the three buildings A, B, and C were to be assessed as one inhabited dwelling-house, none, or at any rate some, or some part only, of the buildings D to R ought to have been comprised in the assessment.

The appellants relied upon the 14th rule of Sched. B, 48 Geo. 3, c. 55 (2), submitting that the masters' dwelling-houses were distinct properties, and that each of the masters was an occupier within the meaning of that rule, and of 14 & 15 Vict.

(1) 31 & 32 Vict. c. 118.

(2) Rule 14: "Where any dwelling-house shall be divided into different tenements being distinct properties, every such tenement shall be subject to the same duties as if the same was an entire house, which duty shall be paid by the occupiers thereof respectively."

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c. 36, and therefore the proper person to be charged, but this was overruled by the commissioners. They also relied upon rule 2 (1), claiming that if the dwelling-house was assessed to house duty, the other buildings were not liable for charge, except they were used as domestic offices such as are named in that rule. The appellants also claimed that rule 3 (2) shewed that it was not the intention of the Act to charge buildings (even though they communicated) in cases where distinct and separate dwelling-houses existed, which could be charged with the duty.

The surveyor submitted that for the purposes of the assessment, the governors of the school were the occupiers—the three masters referred to being in the position of servants only, placed in the houses for the purposes of carrying on the business of the school; that the whole of the premises included in the charge were within one "curtilage" (rule 2), and used in conjunction with the residential portion; that the rule 3 relied on by the appellants shewed that all premises were liable to be included in the valuation for house duty, except the buildings specifically excepted.

The surveyor referred to *Jepson* v. *Gribble* (3), to shew that, as exemption No. 4 of Sched. B was held to exempt all buildings within the curtilage of a hospital, where the exemption did not apply, all within a curtilage must be valued for purposes of inhabited house duty, unless specially excepted. The case of Mr. William Russell (4) was also referred to, as shewing that business premises occupied in connection with a dwelling-house were liable to assessment. It was also pointed out by the

(1) See rule 2, set out in the note to the report of *Clifton College* v. *Tompson*, ante, p. 432.

(2) Rule 3: "All shops or warehouses which are attached to the dwelling-house, or have any communication therewith, shall in charging the said duties be valued together with the dwelling-house and the household and other offices aforesaid thereunto belonging . . . . except such warehouses as are distinct and separate buildings, and not parts or parcels of such dwelling-houses . . . . (notwithstanding the same may adjoin to or have communication with the dwelling-house . . . .)"

(3) 1 Ex. D. 151.

(4) 1 Tax Cas. 135; 4 Court Sess. Cas. 4th Series, 1143; 15 Scottish L. R. 270.

surveyor that 14 & 15 Vict. c. 36 enacted that the charge was to be raised upon the dwelling-house with the household and other offices, and he submitted that the class rooms, chapel, library, big hall, and other buildings fell within such description.

The commissioners determined that the assessment was properly made in one sum upon the governing body of Charterhouse School, as occupiers, in respect of the whole of the buildings referred to, and confirmed the charge.

The questions for the opinion of the Court were—

1. Whether the determination of the commissioners in confirming the assessment was correct, or whether the three masters' dwelling-houses A, B, and C were separately chargeable with the inhabited house duty under 48 Geo. 3, c. 55 and 14 & 15 Vict. c. 36, or not.

2. In either case which, if any, of the buildings D to R ought to be included in the assessment.

Jan. 16. *Cohen, Q.C.* (*J. C. Lewis Coward*, with him), for the appellants. This case should be determined by the same considerations as are applicable in the last case, *Clifton College* v. *Tompson*. (1) The only difference between the two cases is, that in the present case the head master is bound to reside in his house, whereas in the other case he was not bound so to reside; but this is not enough to distinguish the two cases, because here the head master takes in boarders for his own profit, and on that ground at least, if on no other ground, he ought to be regarded as the occupier. As to the remainder of the premises, none of the other buildings can properly be said to be occupied with the head master's house. This is sufficient to entitle the appellants to a decision in their favour, and they are not driven to contend that the school is exempt as a charity. [He referred to *Bent* v. *Roberts* (2); *Riley* v. *Read* (3); *Martin* v. *Assessment Committee of West Derby* (4); *Governors of Charterhouse School* v. *Lamarque*. (5)]

The Solicitor-General, Sir R. B. Finlay, Q.C. (*Danckwerts*,

(1) Ante, p. 432.
(2) 3 Ex. D. 66.
(3) 4 Ex. D. 100.
(4) 11 Q. B. D. 145.
(5) 25 Q. B. D. 121.

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with him), for the respondent. The governing body of the school is the true occupier, and not the head master, for he is bound to reside in the house, and, so far as he can be said to occupy, he only occupies as agent on behalf of the governing body. This also applies to the assistant masters. The other buildings and premises described in the case are accessory to the head master's house. The governing body therefore is properly treated as the occupier of the whole. [He referred to *Hayman* v. *Governors of Rugby School* (1); *In re The Union Bank of Scotland* (2); *Smith* v. *Petrie*. (3) The provisions of the Public Schools Act, 1868 (31 & 32 Vict. c. 118), were also referred to in the course of the argument.]

Cohen, Q.C., replied.

Cur. adv. vult.

Jan. 17. Judgment was delivered as follows:—

WRIGHT J. This is a case of great difficulty and doubt to my mind, as regards one part of it, that is, as regards the head master's house; but after giving to it the fullest consideration that we can, we have both come to the conclusion that the head master ought to be treated as in the occupation of his house. It is true he has to reside there, and that is a very strong fact in favour of the Crown. He pays no rent;—that is not material, except as evidence; he does not do the repairs;—that is not material, except as evidence; the governors have a right to come in and do the repairs, and that again is consistent with his being the occupier; but he lives there as any other person lives there; and what to us, for the purpose of to-day, seems to be the turning-point, is, that he occupies the building for the purpose of keeping boarders there for his own profit. I do not think myself I can usefully add anything to that. It seems to me that we ought to consider him as the inhabitant-occupier in his capacity at any rate as a boarding-house keeper. Whatever his position may be in other capacities, he does inhabit that

(1) L. R. 18 Eq. 28.

(2) 1 Tax Cas. 195; S.C. nom. *Union Bank of Scotland* v. *Solicitor of Inland Revenue*, 5 Court Sess. Cas. 4th Series, 598; nom. *Union Bank of Scotland* v. *Inland Revenue*, 15 Scottish L. R. 319.

(3) 3 Tax Cas. 155; 19 Court Sess. Cas. 4th Series, 405; S.C. nom. *Inland Revenue* v. *Petrie*, 29 Scottish L. R. 342.

dwelling-house as an occupier, for his own purposes, and not merely as the representative, either of the school, or of the statutory corporation who are the owners of the house, or of the governors who have the control of it. That being so, we think, as regards his house, that he is assessable to the inhabited house duty. The same thing applies more strongly to the other masters' houses, but I need not say anything about them.

Then, if so, it follows from our judgment (if it is a right judgment) in the *Clifton College Case* (1) that the college are not assessable for the other parts of the premises, because the other parts of the premises, with perhaps one or two exceptions, are not inhabited dwelling-houses taken by themselves. The boys may possibly in some sense inhabit portions of those premises, but they do not inhabit them as dwelling-houses. In this view of the case, it does not become necessary to consider whether these schools and other premises could be regarded as appurtenances to the masters' houses, within the meaning of the second rule, and I do not myself think that the case has been stated very much with reference to that point. When the masters come to be assessed, if they are assessed, it may be a serious question to consider, but I do not think we ought to decide it.

I ought to add, as to the question whether the same buildings may be assessed under rule 5 as halls or offices, it does not appear to be raised in this case, and the assessment is not put upon that ground.

I think the appeal must be allowed with costs.

KENNEDY J. I agree, and only wish to add one or two sentences. It seems to me impossible to say, looking at the real relation of the parties, and the position of the head master of a place like the Charterhouse, although he is bound to occupy it as head master, and although he ceases to occupy it if he ceases to be head master, that he is occupying as the agent or servant of the governing body, so as to make his occupation simply their occupation; it is sufficient occupying and inhabiting for the purpose of being assessed for inhabited house

(1) *Clifton College* v. *Tompson*, ante, p. 432.

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duty for the purposes of this case. With regard to the other houses, the masters apparently in each case hold their houses upon the terms of paying such a sum by way of rent as may be considered sufficient in each case. Therefore, it is an a fortiori case.

Judgment for the appellants.

Solicitors for appellants: *Lee, Bolton & Lee.*
Solicitor for respondent: *The Solicitor of Inland Revenue.*

P. B. H.

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Feb. 13.

KYFFIN, APPELLANT; EAST LONDON WATER COMPANY, RESPONDENTS.

Waterworks—Metropolis—Supply—Constant Supply—Default by Company—Penalties — Who may take Proceedings — Metropolis Water Act, 1871 (34 *&* 35 *Vict. c.* 113), *ss.* 7, 16, 44 *and* 45.

When a metropolitan water company has provided a supply of water for a district, under s. 7 of the Metropolis Water Act, 1871, a private individual cannot take proceedings against the company for the penalties, imposed by s. 16, for refusing or neglecting "to provide and keep . . . . a constant supply of pure and wholesome water sufficient for the domestic purposes of the inhabitants." Such proceedings can only be taken by the metropolitan authority within the jurisdiction of which the penalty has been incurred.

CASE stated for the opinion of the Court by a metropolitan police magistrate.

A complaint was laid by J. B. Kyffin against the East London Waterworks Company for that the said company, on July 16 and 17, 1895, at premises in Hackney Road, "did unlawfully fail to supply a sufficient quantity of water for domestic purposes."

At the hearing of the complaint the appellant, who was the only witness called, stated that he was the occupier of certain premises in Hackney Road, which included the premises named in the summons, and that on July 16 and 17, 1895, the water supplied by the respondent company to his premises was not sufficient for his domestic purposes.

The appellant had not paid any water rate for the period which included the dates mentioned in the complaint.

Upon the above evidence it was contended by the appellant that the respondents had contravened the provisions of s. 7 of the Metropolis Water Act, 1871, and had incurred the penalties prescribed by s. 16. (1)

On behalf of the respondent company it was objected (inter alia)—

(1.) That a private individual could not take proceedings under those sections:

(2.) That it must be proved that the notice mentioned in s. 16 had been given.

(1) The Metropolis Water Act, 1871 (34 & 35 Vict. c. 113), s. 7: "Subject to the provisions of this Act, every company may, and from and after the expiration of eight months from the passing of this Act every company shall, when required so to do, in the manner directed by this Act, provide and keep throughout their water limits, or throughout such parts of such limits as they may be required in manner aforesaid, a constant supply of pure and wholesome water sufficient for the domestic purposes of the inhabitants within such water limits constantly laid on at such pressure as will make such water reach the top story of the highest houses within such water limits (but not exceeding the level prescribed by the special Act) of such company (which supply is in this Act referred to as a 'constant supply'); and every such company shall, subject to the provisions of the special Act as the same are amended by this Act, give and continue to give to such inhabitants a constant supply for domestic purposes in manner prescribed."

Sect. 16: "Any company which violates, refuses, or neglects to comply with any of the preceding provisions of this Act shall be liable to a penalty not exceeding two hundred pounds, and to a further penalty not exceeding one hundred pounds for every month during which such violation or refusal or neglect to comply with the said provisions continues after they shall have received notice in writing from the Board of Trade" (now the Local Government Board under 35 & 36 Vict. c. 79, s. 35) "to discontinue such violation, refusal, or neglect as aforesaid."

Sect. 44: "Every penalty incurred by any company by reason of non-compliance with any of the provisions of this Act shall go and belong to the metropolitan authority within the jurisdiction of which the same has been incurred, and may be sued for and recovered by such metropolitan authority in any court of competent jurisdiction for the recovery of any ordinary simple contract debt of the like amount, and shall be paid and applied as such metropolitan authority shall from time to time direct."

Sect. 45: "Except as is by the next preceding section expressly provided, all penalties under this Act may be sued for and recovered in the 'Court of Summary Jurisdiction.'"

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The magistrate was of opinion that, in the absence of the notice required by s. 16 of the Metropolis Water Act, 1871 (as amended by 35 & 36 Vict. c. 79, s. 35), the second objection must prevail, and he therefore dismissed the summons.

It was admitted, for the purposes of the argument in the Divisional Court, that a constant supply had been provided for the district.

Bousfield, Q.C., and *W. H. Eldridge*, for the appellant. The ground of the magistrate's decision was erroneous, for the notice provided for in s. 16 applies only to the further penalty of 100*l.* a month. As to the first objection taken on behalf of the respondents, the question is whether any person may proceed summarily for a penalty when there is no express provision in the Act as to who may so proceed. The general principle is stated by Lord Selborne in *Bradlaugh* v. *Clarke* (1), that no man may sue for that in which he has no interest. Here the appellant had a direct interest in there being a sufficient supply of water to his premises. It is not necessary that he should have an interest in the penalty, it is enough if he has an interest in the matter. It can be inferred, by necessary implication from the provisions of this statute, that a person aggrieved is intended to be able to proceed by information or complaint. The provisions of s. 47 of 2 & 3 Vict. c. 71 imply that any person may proceed for penalties in such a case as this. In *Cole* v. *Coulton* (2), a person who had no interest in a penalty was held to be entitled to proceed by information. [*Reg.* v. *Cubitt* (3) was referred to.]

Darling, Q.C., and *R. Bray*, for the respondents. Looking at the information, it appears that the offence charged is under s. 43 of the Waterworks Clauses Act, 1847. (4) That section

(1) 8 App. Cas. 354, 358.

(2) 2 E. & E. 695; 29 L. J. (M.C.) 125.

(3) 22 Q. B. D. 622.

(4) The Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 43: "If, except when prevented as aforesaid, the undertakers . . . . neglect or refuse to furnish to any owner or occupier entitled under this or the special Act to receive a supply of water during any part of the time for which the rates for such supply have been paid or tendered they shall be liable to a penalty of ten pounds, and shall also forfeit to the town commis-

provides expressly for a penalty payable to the consumer himself if he does not receive a sufficient supply. But the consumer cannot proceed for that penalty unless he has paid his water rate. The Act of 1871 provides, by s. 7, for a supply of water to the inhabitants of a district, and the penalties are imposed by s. 16 for failing to supply water to a district. Sect. 44 relates to the penalties payable *by* a water company, which can be recovered only by the metropolitan authority; s. 45 relates to the penalties payable *to* a water company under the Act. In s. 44 the words are that the penalty "*may* be recovered" by the metropolitan authority, thus giving a discretion to that authority to enforce the penalties or not. The whole scheme of the Acts is that an individual who is aggrieved may recover penalties under the Act of 1847, if he has paid his water rates; but that, if a company fails to supply sufficient water to a district, the metropolitan authority may enforce the larger penalties specified in s. 16 of the Act of 1871.

Bousfield, Q.C., replied.

LINDLEY L.J. This is a case stated by a metropolitan magistrate who refused to fine the defendant company at the instance of the appellant Kyffin. Shortly, the facts are as follows:—Kyffin was the occupier of certain premises in the Hackney Road, within the district of the defendant company. He laid an information or complaint that the company did "unlawfully fail to supply a sufficient quantity of water for domestic purposes." The language of that information is open to several interpretations. It does not say who was injured, what was the district, or what was the particular house which was not supplied. The magistrate seems to have thought that the complainant was not entitled to succeed because notice had not been given under s. 16 of the Metropolis Water Act, 1871. Looking at that section, it is plain that its provisions with

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sioners, and to every person having paid or tendered the rate, the sum of forty shillings for every day during which such refusal or neglect shall continue after notice in writing shall have been given to the undertakers of the want of supply."

This Act is incorporated with the respondent company's special Act.

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Lindley, L.J.

respect to notice do not apply here, as has been admitted by the respondents. The particular ground upon which the magistrate decided is founded upon a misconstruction of s. 16. The real question in controversy is a very important one, and is whether any inhabitant of the district, who is aggrieved, is entitled to proceed against the company for the penalties imposed by s. 16 of the Act of 1871. That section runs thus: [The Lord Justice read the section.] The appellant's contention is that, by ss. 44 and 45 of the Act, he is entitled to enforce the penalties imposed by s. 16. Sect. 44 provides that every penalty incurred by any company for non-compliance with the Act shall go to the metropolitan authority, and may be sued for by the authority in any Court of competent jurisdiction; and s. 45 says that "except as is by the next preceding section expressly provided, all penalties under this Act may be sued for and recovered in the 'Court of Summary Jurisdiction.'"

Now, penalties incurred by the company do not go to a common informer or to the Exchequer, but to the metropolitan authority, and may be sued for by that authority. Notwithstanding that, the appellant contends that he may proceed for such penalties for the benefit of the metropolitan authority. At first the contention seemed to be plausible; but it is said that, looking at s. 43 of the Waterworks Clauses Act, 1847, it will appear not to be so; and I think that answer is right. By s. 43 of the Act of 1847 a penalty is imposed; but the appellant cannot enforce that penalty because he has not paid his water rate. He cannot, therefore, proceed under s. 43 for the injury to himself. He contends, however, that he can proceed under s. 16 of the Act of 1871 because the company failed to comply with s. 7 of that Act. Now, s. 7 is not directed to the matter of a supply of water to each inhabitant. It runs thus: [The Lord Justice read the section.] The appellant says that he is aggrieved because he has not received a constant supply, and that he is, therefore, entitled to proceed for penalties. It would be curious if a person, who could not proceed under s. 43 of the Act of 1847, could proceed under s. 16 of the Act of 1871 for the same injury but for a larger penalty. The Act of 1871 provides for the supply of water

to districts, and it is the duty of the metropolitan authority to proceed against a water company for failure to provide such a supply, and that authority alone can properly take proceedings under the Act. The remedy of any individual for personal injury to himself is under s. 43 of the Act of 1847. This construction makes the whole legislation a consistent and reasonable scheme. There are many matters which can be better taken into consideration by the metropolitan authority than by individuals. The appellant's remedy is under the Act of 1847, and not under the Act of 1871. Upon the true construction of the Acts I come to the conclusion that, if the appellant is proceeding for a failure to supply sufficient water to a district, he has no right to do so; and that, if he is proceeding under the Act of 1847, he cannot succeed because he has not paid his water rates.

KAY L.J. I am of the same opinion. Looking at the Act of 1871 alone, a difficult question might arise; but looking at the whole scheme of legislation the matter is quite clear. By the Waterworks Clauses Act, 1847, an individual who does not get a sufficient supply of water has a remedy by proceeding for a penalty of forty shillings a day, which will go into his own pocket, and can be enforced by summary proceedings. This, however, is subject to the reasonable condition that he must first pay his water rate. In 1871 the Metropolis Water Act was passed, which provides that a company, when required to do so, shall provide a constant supply of water to a district (s. 7), and shall be liable to large penalties upon failure to do so (s. 16). Then, in s. 44, there are special provisions as to penalties payable by a company. [The Lord Justice read the section.] There are no other provisions in the Act as to the recovery of penalties payable by a company under that Act. Then comes s. 45: [The Lord Justice read this section.] Now these two sections may be thus reconciled: s. 44 gives a remedy by action, and s. 45 by summary proceedings taken by any one; but in either case the penalties are to go to the metropolitan authority. But there is a question whether the penalties imposed by s. 16 can be recovered under s. 45

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at all, or only under s. 44. If this Act stood alone, that might create a difficulty. But looking at the two Acts together, it would be absurd if a person, who could not recover a penalty under the Act of 1847, might yet proceed under the Act of 1871 to enforce a penalty of 200*l.*, when he had not paid his water rates. The plain scheme of the Acts is that a person who does not get a sufficient supply of water may proceed for penalties under the Act of 1847, if he has paid his water rates; but that the matter of a constant supply of water to a district is for the metropolitan authority, and, if their requirements are not complied with, a heavy penalty is imposed which that authority may recover, and not any inhabitant who does not get sufficient water. This construction makes the whole scheme consistent and reasonable. The other construction would lead to an absurdity. Therefore, although I do not agree with the special reason given by the magistrate, I think that the appellant had no right to proceed.

Judgment for the respondents.

Solicitors for appellant: *Tiddeman & Enthoren.*
Solicitors for respondents: *Geo. Kebbell & Miller.*

W. A.

NOEL *v.* REDRUTH FOUNDRY COMPANY.

1896
March 3.

Employers' Liability Act—Measure of Compensation—Earnings of Apprentice —43 & 44 Vict. c. 42, s. 3.

By the Employers' Liability Act, 1880, s. 3, the amount of compensation recoverable under the Act is limited to a sum equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade, employed during those years in the like employment, and in the district in which the workman is employed.

The plaintiff was apprenticed to the defendants, and received a salary of 1*s.* a week for the first year, increasing 1*s.* a week each year. In the fifth year, when he was earning 5*s.* a week, he was injured, and brought an action to recover compensation under the Act. Evidence was given that at the end of the fifth year, when the plaintiff would be out of his apprenticeship, he would be able to earn from 14*s.* to 18*s.* a week, and the compensation was assessed at 80*l.*:—

Held, that the amount which the plaintiff could earn when out of his apprenticeship could not be taken into consideration, but only the amount of his actual earnings as an apprentice; and the amount of the judgment must therefore be reduced.

APPEAL by the defendants from the judgment of the judge of the county court of Cornwall, holden at Redruth.

The plaintiff, an infant, sued by his next friend, under the Employers' Liability Act, 1880, to recover damages for personal injury. At the date of the injury the plaintiff was about eighteen years of age, and had been apprenticed to the defendants for a period of something over four years, and was employed as a pupil fitter in their works. The county court judge found in favour of the plaintiff on the question of liability, and this finding was not now questioned. The plaintiff had received a salary, beginning at 1*s.* a week during the first year of his apprenticeship, and increasing 1*s.* a week each year, so that in the fifth year, when the injury took place, he was receiving 5*s.* a week. Evidence was given at the trial, the effect of which was that, at the end of the fifth year, when the plaintiff would be out of his apprenticeship, he would have been able, but for the injury, to earn in the like employment, and in the same district, from 14*s.* to 18*s.* a week. The county court judge

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assessed the compensation recoverable at 80*l.*, and gave judgment for the plaintiff for that amount; and the defendants now appealed, on the ground that the amount of compensation was excessive, being assessed on a wrong basis.

Sect. 3 of the Employers' Liability Act, 1880, which limits the amount of compensation recoverable under the Act, is set out in the judgment of Wills J.

Lawson Walton, Q.C. (*W. Ellis Hill* with him), for the defendants. The compensation was assessed on a wrong basis, and is more than the plaintiff, in any view of the case, can be legally entitled to. The proper mode of calculation, according to the plain meaning of the section, would be to take the three years preceding the injury, and allow for so much of the fifth year as had expired at the rate of 5*s.* a week, for the fourth year at 4*s.*, for the third year at 3*s.*, and for so much of the second year as had to be taken into account to make up the full period of three years next preceding the injury at 2*s.* The defendants, however, are willing to concede that the plaintiff may retain the judgment for 5*s.* a week during the three years, which amounts to 39*l.*

Bosanquet, Q.C. (*J. A. Hawke* with him), for the plaintiff. The evidence shews that the plaintiff was competent to earn from 14*s.* to 18*s.* a week. That would be equivalent to the estimated earnings of a person of the same grade employed in the like employment in the district. The word used in the Act is "earnings," not "wages," and includes more than the money actually paid as wages. The plaintiff in the present case was earning, in addition to the money payment, the tuition which he received under his apprenticeship, and the value of that tuition may be taken into account in estimating the compensation.

Lawson Walton, Q.C., replied.

WILLS J. With much regret I have come to the conclusion that the judgment in this case must be varied by reducing the amount of the compensation. We are bound by the words of the Act of Parliament, the Employers' Liability Act, 1880

(43 & 44 Vict. c. 42), s. 3, which are these: "The amount of compensation recoverable under this Act shall not exceed such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment, and in the district in which the workman is employed at the time of the injury." The evidence in the present case is, that the plaintiff, at the time of the injury, was earning 5*s.* a week. He was earning that sum as a pupil fitter, and was in a condition, which is described in one part of the evidence as earning it until his time was up, and in another part as earning it during pupilage. The natural inference is that 5*s.* a week is the normal wages of a pupil fitter. The evidence which was given only comes to this, that he would be able to earn from 14*s.* to 18*s.* a week when he was out of his pupilage. It seems clear that if at the time of the injury he could have earned that amount, he would not have continued to work at 5*s.* a week. It follows, therefore, that, on the evidence which was before the county court judge, the plaintiff could not get anything beyond 39*l.*—an amount which Mr. Lawson Walton, on behalf of the defendants, does not now think it worth while to contest the plaintiff's right to retain. I am not, however, satisfied that, on the true construction of the section, the standard of the actual earnings during the last three years preceding the injury can be left out of consideration, and that only the words, "estimated earnings of a person in the same grade employed in the like employment, and in the district in which the workman is employed," are to be taken into account, the suggestion being that the only standard of calculation is the rate of wages earned by persons of a similar class at the time of the accident: a proposition to which I am not, as at present advised, prepared to assent. But, as the amount of 39*l.* is conceded, it is not necessary to decide as to this. Then it is contended on behalf of the plaintiff that the expression "earnings" is capable of being construed as including the value of the tuition which the plaintiff was receiving during his apprenticeship. I cannot think that anything so vague as that can have been

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contemplated by the Act of Parliament, though I think some things other than money, but having a definite money value, might be included, as for instance food or clothing, if they were provided.

For these reasons, I am of opinion that the judgment of the county court judge must be varied, and judgment for the plaintiff must stand for the sum of 39*l.* only.

WRIGHT J. I am of the same opinion. I think the measure of compensation must be the wages of a pupil fitter, but that the value of anything that might be supplied, such as food or clothing, which could be estimated at a money value, might be taken into account.

Appeal allowed. Judgment varied.

Solicitors for plaintiff: *Robbins, Billings & Co., for Paige & Grylls, Redruth.*

Solicitors for defendants: *Watson, Sons & Room, for Daniell & Thomas, Camborne.*

P. B. H.

COLLMAN, Appellant; ROBERTS, Respondent.

1896
Feb. 13.

Shop Hours Act, 1892—*Employment "in or about a Shop"—Work partly away from the Premises*—55 & 56 *Vict. c.* 62.

By the Shop Hours Act, 1892, s. 3, "No young person shall be employed in or about a shop for a longer period than seventy-four hours, including meal times, in any one week."

A newsagent, occupying a shop for the purposes of his business, employed a boy whose work was done partly inside the shop, and partly away from the shop in fetching newspapers and delivering them to the customers:—

Held, that the whole employment was "in or about" the shop within the meaning of the Act.

Case stated by a metropolitan police magistrate for the opinion of the Court.

The respondent, Roberts, was summoned by the appellant, Collman, on behalf of the London County Council, for having, during the week June 16 to June 22, at No. 195, High Street, Shoreditch (being a shop within the meaning of the Shop Hours Act, 1892 (1)), unlawfully employed in and about the said shop one C. Medcraft (being a young person within the meaning of the said Act) for a longer period than seventy-four hours including meal times.

The following facts were proved or admitted. Roberts was a newsagent, and occupied the said premises for the purposes of receiving and retailing newspapers, and the premises were a shop within the meaning of the Shop Hours Act, 1892. He employed Medcraft in connection with such receiving and retailing of newspapers, and Medcraft was a young person

(1) The Shop Hours Act, 1892 (55 & 56 Vict. c. 62), "Whereas the health of many young persons employed in shops and warehouses is seriously injured by reason of the length of the period of employment:"

Sect. 3: (1.) "No young person shall be employed in or about a shop for a longer period than seventy-four hours, including meal times, in any one week."

Sect. 9: "In this Act, unless the context otherwise requires—

"'Shop' means retail and wholesale shops, markets, stalls, and warehouses in which assistants are employed for hire, and includes licensed public-houses and refreshment houses of any kind;

"'Young person' means a person under the age of eighteen years."

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within the meaning of the Act. In the course of such employment Medcraft fetched newspapers from Fleet Street; delivered them to customers at their addresses; sold newspapers on behalf of Roberts both inside and outside the shop; and, inside the shop, folded up newspapers, did up country parcels, swept out the shop, and cleaned the windows.

The period of time, calculated from the time at which Medcraft arrived at the shop to the hour at which he ceased working for Roberts, on each of the seven days from June 16 to June 22, amounted to eighty-four and a half hours, and during the whole of such period of eighty-four and a half hours Medcraft was occupied in performing some portion of the above duties in the course of his employment, or in going to or returning from or taking his meals in the times allowed to him for that purpose. If the period to be calculated for the purposes of the Act is limited to the times during which Medcraft was at work in or about the premises occupied by the shop, then he was not employed in or about the shop for a longer period than seventy-four hours, including meal times, in the week; but, if the period to be calculated for the purposes of the Act is not so limited, but should include the times occupied in fetching newspapers from Fleet Street, and delivering them to customers at their addresses not in or about the premises, then Medcraft had been employed for a period of eighty-four and a half hours, including meal times, in the week.

The magistrate adopted the first of the above constructions of the Act, dismissed the summons, and stated this case for the opinion of the Court.

Horace Avory, for the appellant. The question in this case is, what is the meaning of the words "employed in or about a shop" in s. 3 of the Shop Hours Act, 1892? The magistrate held that they applied only to the time during which the boy was employed on the premises, and not to the time when he was employed away from the premises in fetching and delivering newspapers. The definition of "shop" in s. 9 shews that the Act must apply to cases in which it is necessary that the assistant should do part of his work away from the premises.

The preamble shews that the object of the Act is to limit the hours of work, and not to provide that it shall be done under sanitary conditions. The enactment ought not to be limited to the time the assistant is actually employed upon the premises, but ought to be held to apply to the whole time during which he is really and substantially employed in or about the business of the shop.

The respondent did not appear.

LINDLEY L.J. In this Act the word "shop" seems to be used throughout with reference to the structure or place, as distinguished from the business carried on at that place. Here there is a shop, and a shop boy whose work is partly indoor and partly outdoor; his outdoor work takes him some distance away from the place where the shop is situated. The question is whether, when employed in outdoor work, the boy was employed "in or about a shop." If he was not, then the hours employed in outdoor work cannot be counted for the purposes of the Act. If he was, then the statutory number of hours has been exceeded. We must consider what was the object of the Act, and the mischief which it was intended to prevent. The object was to protect the health of young persons employed in shops. The preamble says that their health is seriously injured by reason of the length of the period of employment. The object was, not to insure sanitary conditions, but to protect the health of those employed for an undue length of time. If we adopt the narrow construction of the Act, we should limit its beneficial operation in all cases where the work was partly indoor and partly outdoor. I think that the true construction of the Act is, that where there is a shopkeeper and a young person in his service, the young person is not to be employed for the purposes of the business of the shopkeeper for more than seventy-four hours a week. The construction put upon the Act by the magistrate, though it is certainly warranted by the words of the Act, is calculated to defeat its object, and I think it cannot be the true construction. I, therefore, think that the respondent ought to have been convicted.

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KAY L.J. This is a very important question. The statute was passed for the purpose of preventing shopkeepers from employing young persons, under the age of eighteen, for an undue length of time—that is, for more than seventy-four hours a week, including meal times. The words of the Act are: [The Lord Justice read s. 3, sub-s. 1.] Here there is a shop, and the shopkeeper has a boy in his service; the boy is employed inside the shop, but also a part of his employment is to fetch and deliver newspapers. The difficulty is to determine whether the latter kind of work is employment "in or about a shop." If it is not, the time when the boy is away from the premises on the business of the shop must be deducted. If that were so, the boy might be employed all day and all night without infringing the Act. Take an analogous case. There may be a dressmaker who employs young girls, whose work may partly be to go out to deliver light parcels, or to measure, or to try on dresses, besides working on the premises. Are those times not to be counted? I cannot think that the statute does not include such cases, or that it would be a true construction so to reduce its operation. Such a construction would enable people easily to evade the Act. Here the canon of construction applies, that the mischief at which the statute is aimed must be considered when the words are difficult to construe. The mischief here is employment for an undue length of time. I think that the magistrate placed too narrow a construction upon the Act, and that, in this case, the employment was all "in or about the shop" within the meaning of the Act.

Judgment for the appellant. Case remitted to the magistrate to convict.

Solicitor for appellant: *W. A. Blaxland.*

W. A.

ESCRITT *v.* TODMORDEN CO-OPERATIVE SOCIETY.

1896
Feb. 25.

Industrial and Provident Society—Intestacy of Member—Power of Committee to distribute Property—Industrial and Provident Societies Act, 1876 (39 & 40 *Vict. c.* 45), *s.* 11, *sub-s.* 6—*Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *s.* 27.

By s. 27 of the Industrial and Provident Societies Act, 1893, if any member of a society entitled to property therein dies intestate without having made any nomination thereof then subsisting, the committee may without letters of administration distribute the same among such persons as appear to them on such evidence as they deem satisfactory to be entitled by law to receive the same:—

Held, that the power of the committee to distribute the property was entirely discretionary, and that they could not be compelled by action to exercise their discretion.

Appeal from the county court of Yorkshire, holden at Todmorden.

The action was brought by the next of kin of David Escritt, deceased, to recover the sum of 10*l.* from the defendant society. It appeared that David Escritt, who was a member of the society, died intestate in May, 1891, being then possessed of the sum of 100*l.* standing to his credit in the books of the society, which sum he had duly nominated in 1885 in equal shares among his ten children. After his death the committee of the society paid the sum of 90*l.* among the persons entitled thereto under such nomination; but they retained the sum of 10*l.*, representing the share to which John Escritt, a son of David Escritt, would have been entitled thereunder if living.

It appeared that John Escritt had gone to America many years before, and that he had not been heard of since January, 1884. Upon these facts the county court judge held that the committee were bound to presume that John Escritt died before David Escritt, and that the defendants ought to have paid over the money to the next of kin under s. 27 of the Industrial and Provident Societies Act, 1893 (1), and gave

(1) By s. 27 of the Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), "If any member of a registered society entitled to property therein in respect of shares, loans, or deposits, not exceeding in the whole

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judgment for the plaintiffs. In the course of the hearing he amended the claim by adding the administratrix of David Escritt as a plaintiff.

The defendants appealed.

C. A. Russell, for the appellants. The county court judge was wrong. The committee had no right under s. 27 to distribute the 10*l.* unless there was an intestacy in respect thereof, and no nomination subsisting at the death of the nominator in regard to it. They were under no obligation to determine the question whether John Escritt died before David Escritt. Sect. 30 of the Act would not protect them against the result of wrongly determining such a question. Secondly, no action lies against the defendants under the section. The words of it are, "The committee *may*" distribute the property, and this must be contrasted with the language of the Industrial and Provident Societies Act, 1876, s. 11, sub-s. 6: "If any member of a society entitled to an interest in the society . . . . dies intestate and without having made any nomination under this Act which remains unrevoked at his death, such interest *shall* be transferable or payable" to the persons entitled to receive the same. The Legislature, therefore, deliberately intended by the later Act to give the committee a discretion to distribute the property where there was an intestacy and no nomination subsisting. The committee cannot be compelled by action to exercise that discretion.

The county court judge had no power to amend by adding the administratrix as claimant. By s. 49 of the Act of 1893 and the rules of the society all disputes between the society and persons claiming through a member of the society must be referred to arbitration. The administratrix is a person claiming through a member of the society, and the effect of the amendment was therefore to bring in a claim over which the county court had no jurisdiction.

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at his death one hundred pounds, dies intestate, without having made any nomination thereof then subsisting, the committee may, without letters of administration, distribute the same among such persons as appear to them on such evidence as they deem satisfactory to be entitled by law to receive the same."

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The society is willing in this case to pay the 10*l.* to the administratrix of David Escritt; but the question whether the committee can be compelled by action to exercise the powers conferred upon them by s. 27 is one of great importance to such societies.

Herbert Lush, for the respondents. On the fact being proved that John Escritt had not been heard of for more than seven years before the death of David Escritt, the committee were bound to presume that no nomination was subsisting in respect of the 10*l.* at the date of the death of David Escritt: *In re Lewes' Trusts* (1); *In re Rhodes*. (2) There being an intestacy, the next of kin were entitled to the money. The committee could not refuse to pay it to the administratrix of David Escritt. There is no absolute right to insist on arbitration, and the committee did not elect to go to arbitration within the time limited.

WILLS J. This case raises a point of great importance to all industrial societies. I am of opinion that Mr. Russell's construction of s. 27 of the Industrial and Provident Societies Act, 1893, is the right one. Assuming a state of facts which would entitle the committee of the society to act at all, action by them under the section is purely discretionary. Unless a member of the society has died intestate without any nomination of his property in the society which subsists at the time of his death, they cannot act under it at all; but even if these facts are proved, the section goes on, "the committee *may*" distribute the funds among such persons as appear to them entitled by law to receive the same. The change of language from that of the section of the Act of 1876 (s. 11, sub-s. 6), which dealt with the same subject, is very significant. That section provided, "If any member of a society entitled to an interest in the society not exceeding 50*l.* dies intestate and without having made any nomination under this Act which remains unrevoked at his death, such interest *shall* be transferable or payable without letters of administration to or among the persons who appear to a majority of the committee, upon

(1) L. R. 6 Ch. 356. (2) 36 Ch. D. 586.

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such evidence as they may deem satisfactory, to be entitled by law to receive the same." It seems to me that the change of language from "shall" to "may" was intentional and deliberate. The decision, however, does not and cannot relieve the society of the real difficulty in the case, which is the doubt that may remain whether the nominee was dead and died without issue before David Escritt died. The committee *can* only act under s. 27 if the nominee be out of the way. Whether they act under that section or not, if even by the judgment of a Court they pay the administrator or next of kin of David Escritt on the supposition that the nominee's claims are out of the way and it turns out that they are wrong (as happened in a recent case in the Divorce Court), they would have under ss. 25 and 26 to pay over again.

The action of the committee, however, under s. 27 is clearly discretionary.

WRIGHT J. I agree. I think the committee are entitled to require that they should be satisfied in the proper way both of the intestacy and of the fact that no nomination subsisted at the date of the death of the intestate; and even then I do not think that they can be compelled by action to exercise the discretion given to them by s. 27.

Order accordingly.

Solicitors for appellants: *Bower, Cotton & Bower, for Aston, Harwood & Somers, Manchester.*

Solicitors for respondents: *Emmet, Son & Co., for Ingham, Todmorden.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

C. A.
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March 2, 3.

LONDON COUNTY COUNCIL *v.* PRYOR.

Metropolis—Management Acts—General Line of Buildings—Site of Old Building—Land occupied with House—New Street—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *ss.* 74, 75.

A new street was formed in the metropolis, opening at a right angle into an existing street in which there was a continuous row of houses with forecourts in front and gardens behind. The plan for the new street submitted to the London County Council contained a note stating that two of the above-mentioned houses were (among others) to be pulled down, and the new street, as shewn by the plan, occupied the whole site of one of them with the forecourt and garden belonging thereto, and part of the site of the other and of the forecourt and garden belonging thereto, which were respectively forty-eight and ninety feet in depth. These houses having been pulled down, the owner of the last mentioned of them was erecting on so much of its site and the forecourt and garden on each side of it as was not thrown into the new street a block of buildings fronting to the new street, which projected beyond the general line of buildings in that street as fixed by the superintending architect of the county council :—

Held, that he was not building on the site of a previously existing building within the meaning of s. 74 of the Metropolis Management Amendment Act, 1862, and therefore was infringing the provisions of s. 75 of that Act, which forbids the erection of buildings beyond the general line of buildings in a street.

Lord Auckland v. *Westminster District Board of Works* (L. R. 7 Ch. 597) distinguished.

Appeal from the judgment of a Divisional Court (Lawrance and Collins JJ.) upon a case stated by a metropolitan police magistrate. (1)

The facts as they appeared in the Court of Appeal were as follows. (2) Prior to the year 1890 there was situate in Stoke Newington Road, in the parish of Stoke Newington in London, a continuous row of houses numbered 69 to 85 (odd numbers only) fronting to that road and having forecourts in front and gardens at the back. In 1890, a new street called Prince George Road was made, opening at a right angle into the Stoke Newington Road. The plan of the new street previously

(1) Reported ante, p. 330.

(2) In the Court of Appeal facts were stated which did not appear in the special case.

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submitted to the appellants (1), the London County Council, by the owner of the property contained a note stating that the houses numbered 79, 81, 83, and 85 in Stoke Newington Road were to be taken down and the proposed new street as shewn on the plan occupied the whole site of No. 81 with the forecourt and garden belonging thereto, and part of the site of No. 83 and of the forecourt and garden belonging thereto. No. 81 was pulled down when the new street was made, and the sides of the forecourt and garden of No. 83 were set back a few feet. Nos. 83 and 85 remained standing at the date of the hearing before the magistrate, but had, it appeared, been subsequently pulled down. On October 20, 1894, the respondent (1), Pryor, who was a builder, began to erect for the owner of Nos. 83 and 85 a block of buildings in the new street without the consent of the appellants. It appeared that these buildings when complete would occupy the site of No. 85 with the forecourt and garden on each side of it, and so much of the site of No. 83 and the forecourt and garden on each side of it as was not thrown into the new street. (2)

On January 22, 1895, the appellants' superintending architect by his certificate decided the general line of buildings in Prince George Road, which was seven feet further back from the said road than the front line of the buildings so begun to be erected by the respondent, and he decided that the buildings were in Prince George Road. The depth of the forecourt of No. 83 was forty-eight feet, and that of the garden at the back was ninety feet.

On April 1, 1895, the respondent appeared before the magistrate to answer a complaint made by the appellants under s. 75 of the Metropolis Management Amendment Act, 1862 (3), that

(1) The terms "appellants" and "respondent" are used in this report as meaning respectively the appellants and respondent in the Court below.

(2) It will be seen on reference to the report of the case in the Court below that the respondent had only begun to build on the forecourts and gardens when complaint was made to the magistrate, the houses Nos. 83 and 85 not being then pulled down.

(3) Sects. 74 and 75 of that Act were repealed by s. 215 of the London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), which came into operation January 1, 1895. The section preserves any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment thereby repealed.

he had unlawfully begun to erect the said building beyond the general line of buildings in Prince George Road without the consent in writing of the appellants. The magistrate was of opinion, upon the facts as they appeared before him, that the case was undistinguishable from *Lord Auckland* v. *Westminster District Board of Works* (1), and that the respondent was entitled to build as he was doing beyond the general line of buildings. He accordingly dismissed the summons subject to a case. The question for the opinion of the Court was whether, upon the facts stated, his decision was right. The Divisional Court held that his decision was wrong.

The respondent appealed.

McCall, Q.C., and *Macmorran, Q.C.*, for the respondent. The case of *Lord Auckland* v. *Westminster District Board of Works* (1) decided that the 75th section of the Metropolis Management Amendment Act, 1862, did not apply to cases where an old building was pulled down and a building erected on its site; and, secondly, that a piece of ground which had been a courtyard belonging to an old building must be treated for this purpose as being part of the site of the old building. It may be that a very large piece of ground held with a building would not come within that decision. It is a question of degree that must be decided on the facts of each case. The magistrate dealt with it in this case as a question of fact, and found that the facts of the case were undistinguishable from those in *Lord Auckland* v. *Westminster District Board of Works*. (1) He must therefore be taken to have found as a fact that the forecourt and garden were part of the house that had been taken down. The special case therefore does not really raise any question of law, and the Court cannot review the decision of the magistrate on the question of fact if there was any evidence upon which he could find as he did. They cited *Barlow* v. *Kensington Vestry* (2); *Lavy* v. *London County Council* (3); *Allen* v. *London County Council*. (4)

Avory, and *Daldy*, for the appellants. The case raises a

(1) L. R. 7 Ch. 597.
(2) 27 Ch. D. 362.
(3) [1895] 2 Q. B. 577.
(4) [1895] 2 Q. B. 587.

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question of law, because the magistrate has misapplied the principle of *Lord Auckland* v. *Westminster District Board of Works* (1) to a state of facts which does not come within it. There are two reasons why that decision is inapplicable to the present case. That case only decided that a man who was re-erecting a building was entitled to re-erect it on the site of the old building which had been pulled down, subject to the power of the authority to make him set it back to the general line of buildings upon payment of compensation under s. 74 of the Metropolis Management Amendment Act, 1862. The forecourt and garden in the present case covered a much larger area than the house itself, and cannot possibly be regarded as part of its site. Secondly, in *Lord Auckland* v. *Westminster District Board of Works* (1) the decision was that a man who had bought the site of a house in an existing street was entitled to rebuild in that street on the site of the old house. Here it is really a question of building de novo in a new street. The houses pulled down were houses in Stoke Newington Road, they had no situation, and there were no vested rights in respect of them in Prince George Road. In order to get the approval of the county council for the plan of the new street, the owner of the property gave notice that he intended to pull down these houses. He therefore abandoned his right in respect of them.

Macmorran, Q.C., in reply.

LORD ESHER M.R. It was argued that this case was not properly stated, because it raised a question which was one of fact and not of law. It seems to me that this is not so. What the magistrate appears to me to have done is to find all the facts, and then to ask us whether those facts bring the case within the principle of law laid down in *Lord Auckland* v. *Westminster District Board of Works*. (1) In this case there was an existing street, and it was desired by the owner of the property, not to do anything merely in that street, but to form a new street which was to run into it at one end. The question is as to the line of building, not in the old street, but in the new one. There was a house No. 83 in the old street which, when

(1) L. R. 7 Ch. 597.

the new street came to be formed, became a building by the side of that street, and beyond it there had been erected in the new street a sufficient number of houses in a row to form a guide as to what was the general line of buildings in the street. The superintending architect gave his certificate, as he had jurisdiction to do, deciding that to be the general line of buildings in the new street. The house No. 83, which projected beyond that line, has since the giving of the certificate been pulled down. When the owner of the property who was about to lay out the new street was seeking the approval of the county council for the plan of it, he indicated upon that plan that the house in question was to be pulled down in order to form the new street. The contention of the respondent is that he has a right to build upon part of the site of it and on certain pieces of ground on each side thereof buildings which will project beyond the building line certified by the superintending architect. For the appellants it is contended that he is not entitled so to build on those pieces of ground; and, further, that the right to the old house and to rebuild on the site of it has been abandoned; that this building is in the new street; and that, when it is sought to build a building in the new street on the land on which the old house stood, that building must conform to the general building line certified in respect of the new street. It was argued for the respondent that the case fell within the decision in *Lord Auckland* v. *Westminster District Board of Works*. (1) In that case there was an existing street, and a house which stood in it had been pulled down. There was a small piece of ground forming a courtyard which belonged to that house. The owner desired to rebuild on the site of the house and on that piece of ground. It was held that he was entitled to rebuild the house, and that, as the piece of ground was part of the curtilage and really part of the house, he was entitled in rebuilding to build upon it as being part of the site of the old house. That case does not seem to me to be like the present. It appears to me impossible to say that the forecourt and garden of the old house No. 83, as shewn in the plan, were part of the house itself. There is nothing in s. 74 of the

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Metropolis Management Amendment Act, 1862, to shew that there is any right to rebuild beyond the general building line of the street on land which cannot be considered to have been part of the old building before it was taken down. Therefore, in answer to the question which is put to us, I say that the principle of *Lord Auckland* v. *Westminster District Board of Works* (1) does not apply to this case. But, carrying the matter a little further, it appears to me that in the present case the building owner is not proposing to rebuild the old house, but to build a new and different building which will extend over two pieces of ground neither of which was part of the old house. Under these circumstances I do not think s. 74 applies, and consequently the case must fall under s. 75. I do not think the respondent is really rebuilding any part of the old house, but, having abandoned the right to the old house, he is building a new and different building on land which must be treated as if it had never been built upon before. Therefore, in my opinion, we must decide this case in favour of the London County Council and dismiss the appeal.

LOPES L.J. I am of the same opinion. It has been suggested that the case has been improperly stated by the magistrate on the ground that it merely raises a question of fact. I think that is a misconception. It appears to me that what he has done is to find the facts, and, being in doubt as to what the effect of those facts is in point of law, to ask the Court whether the principle laid down in *Lord Auckland* v. *Westminster District Board of Works* (1) is applicable to them. I am of opinion that that is a question of law on which he was entitled to state a case. The only point really raised is whether this case is distinguishable from *Lord Auckland* v. *Westminster District Board of Works*. (1) That involves the question whether the land formerly occupied by the forecourt and garden of the house in question comes within the word "building" as used in s. 74 of the Metropolis Management Amendment Act, 1862. It is said that it does by virtue of the decision in *Lord Auckland* v. *Westminster District Board of Works*. (1) In my opinion

(1) L. R. 7 Ch. 597.

the point decided in that case is entirely different from that which arises here. In that case a small courtyard inclosed by a wall was held to have been appurtenant to the house which was pulled down in such a way as to form part of it. I can quite understand that there may be cases in which such a piece of land may be said to form part of the house. But the land in question here was not such a courtyard, but a considerable area of land not built on in front of the house and a larger area still forming a garden at the back. I think it is impossible to hold that such pieces of land were appurtenant to the house in such a way as to form part of the building. Therefore, in my opinion, the answer to the question raised by the case must be that this case is distinguishable from *Lord Auckland* v. *Westminster District Board of Works*. (1) Furthermore, it appears to me that this building was being erected in Prince George Road, and, inasmuch as that was a new street, I do not see how there could be an existing site in that street: and on that ground also I think s. 74 does not apply to this case. For these reasons I think the appeal must be dismissed.

RIGBY L.J. I am of the same opinion. The case of *Lord Auckland* v. *Westminster District Board of Works* (1) appears to have decided two points. The first of the points so decided was that the mere pulling down of a house did not make the site of it vacant ground for the purposes of ss. 74 and 75, which seems to me to be a reasonable view. The second point decided had reference to a small piece of ground which was, before the house had been pulled down, a courtyard separated by a wall from the street, and was, in fact, in such a position as to form part of the house. It was held that, as the plaintiff had a right to rebuild, he might rebuild on any portion of the site of the old house, and therefore upon this piece of land. Nothing more was decided which is material to this case. The only question raised is whether, as a matter of law, that decision is applicable to the facts which the magistrate has found in the special case. The Divisional Court held that it was not, and I see no reason for questioning the correctness of

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their decision. For the purpose of determining the question raised, I think we are entitled to consider the circumstances under which the building was pulled down to see whether the site of it was reserved in order that it might be rebuilt. From the plan which was submitted to the London County Council, we find that, when the owner of the property was applying for their sanction to the making of a new street running at right angles to the old street, he expressed a deliberate intention of pulling down, in order to form the new street, certain houses, including No. 81, which was pulled down accordingly, and Nos. 83 and 85, which were not pulled down when the superintending architect fixed the general line of the new street, but have since been pulled down. This fact seems to me to distinguish this case entirely from the case of *Lord Auckland* v. *Westminster District Board of Works* (1), in which a house had only been taken down in order that the site might be rebuilt upon. The intention shewn by the plan in this case was that these houses should be taken down not in order that they might be rebuilt, but in order to form a new street. The width of the proposed street extended beyond the wall of No. 83, and on the plan the line of the street is shewn as going through it, so that under no circumstances could it be replaced by a new building having the same frontage on the old site. The plan seems to me to shew that the right to rebuild the old house was abandoned. But the case of *Lord Auckland* v. *Westminster District Board of Works* (1) is distinguishable on another point. It cannot be considered as deciding that, because a man is entitled to rebuild on the site of an old building, he is entitled to build on any land which was held with that old building. The decision must be construed as confined to rebuilding on the same site as that on which the old building stood. In the present case the forecourt was about forty feet and the garden was about ninety feet in depth. To hold that they could be brought within the decision in *Lord Auckland* v. *Westminster District Board of Works* (1) and treated as forming part of the site of the old house seems to me to be going far beyond anything that can be considered to be decided by

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that case as properly understood. The building which is in the course of erection by the respondent projects beyond the general building line fixed by the superintending architect to the extent of seven feet. The question involved is whether the case comes within s. 74 or within s. 75 of the Metropolis Management Amendment Act, 1862. For the reasons which I have already given I think it clearly comes within s. 75, and not within s. 74, and therefore the respondent was not entitled to build beyond the line which, in the exercise of his jurisdiction, the superintending architect had certified as the general line of buildings in the street.

Appeal dismissed.

Solicitor for appellants: *Blaxland.*
Solicitors for respondent: *Edell & Gordon.*

E. L.

[IN THE COURT OF APPEAL.]

C. A.
1896
March 6.

In re LEONARD.
Ex parte LEONARD.

Bankruptcy—Receiving Order—Absence of Assets—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 3.

It is not a sufficient cause for refusing to make a receiving order in bankruptcy that the debtor has apparently no assets for distribution among his creditors.

APPEAL against a receiving order made by a registrar in bankruptcy.

It was contended before the registrar upon the hearing of the petition that it was apparent upon the evidence before him that the debtor had no assets for distribution in bankruptcy, and therefore a receiving order ought not to be made. The registrar, not being satisfied that there were no assets, made a receiving order.

Herbert Reed, Q.C., and *C. L. Attenborough*, for the debtor. The Court may, under s. 7, sub-s. 3 of the Bankruptcy Act, 1883, dismiss the petition for any sufficient cause. It is

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submitted that, upon the evidence, it appears that the debtor has no assets available for distribution among creditors. That being so, an adjudication of bankruptcy would be, as was said by Jessel M.R. in *Ex parte Robinson* (1), an altogether vain thing. When it is proved that there is no estate to administer, the Court will not sanction the useless expense of bankruptcy proceedings. One of the grounds upon which the Court dismissed the petition in *In re Otway* (2) was that there were no assets.

Ringwood, for the petitioning creditors. It is not shewn that the debtor has no assets. The circumstances in the case of *In re Otway* (2) were very special. The Court thought that there was mala fides on the part of the petitioning creditor, and an adjudication would have destroyed a life interest out of which the debtor was proposing to pay a composition. A petitioning creditor cannot know when the petition is presented whether there are assets. It cannot have been intended that on the hearing of the petition there should be a long and expensive inquiry as to the existence of assets. One of the objects of bankruptcy proceedings is that there may be a public examination of the bankrupt at which he may be examined as to his transactions and property. It may appear at that examination that there have been transactions by him upon the avoidance of which assets may come into existence.

H. Reed, Q.C., in reply.

LORD ESHER M.R. I see no reason for interfering with the order which the registrar has made. It is suggested that nothing can be got by making the debtor a bankrupt, and, therefore, using a phrase which has been caught up from what the late Master of the Rolls said in *Ex parte Robinson* (1), the Court ought not to make a receiving order, because it would be doing a "vain thing": and the case of *In re Otway* (2) was cited as an authority to that effect. I do not think that there is any case which is an authority for the proposition contended for, and there appears to be a case which is an authority

(1) 22 Ch. D. 816. (2) [1895] 1 Q. B. 812.

against it. In the case of *In re Hecquard* (1) Lindley and Lopes L.JJ. both point out that, at the time when the petition is presented and before a receiving order is made, it is impossible to tell whether there will prove to be any assets or not. All the petitioning creditor then knows or need know is that a debt is owing to him, and that, after taking the necessary steps to procure payment of that debt, he cannot get payment of it; and therefore he asks that the debtor may be made bankrupt. The Court cannot at that stage tell whether the proceedings in bankruptcy will have no result. If the debtor is made bankrupt, there will be a public examination of him, and then it may be ascertained whether he has any assets. At the time of the petition and adjudication the Court has not the proper materials for judging whether there are assets or not. The only question in the case of *Ex parte Robinson* (2) was whether the Court ought to make bankrupt in England a debtor who had already been made a bankrupt in Scotland, and who had no assets in England. It was held that there was jurisdiction to do so; but, inasmuch as the debt could be proved under the bankruptcy in Scotland, there was no reason for doing so, and therefore, in the exercise of their discretion, the Court refused to make the debtor a bankrupt. That case is altogether different from the present. The case of *In re Otway* (3) is no authority for the proposition that the fact of there possibly or probably being no assets to be administered in bankruptcy is a reason sufficient of itself for refusing to make an adjudication of bankruptcy. In that case, it being ascertained that a receiving order would deprive the debtor of the only asset available for the payment of a composition which he proposed to pay upon his debts, it was held that that was a sufficient reason why the Court in the exercise of its discretion should not make a receiving order. There was also in that case the additional fact that the petitioning creditor had endeavoured to obtain money from the debtor as a condition of his agreeing to the adjournment of the petition, and the Court came to the conclusion that the petitioning creditor was using the petition for the purpose of

(1) 24 Q. B. D. 71. (2) 22 Ch. D. 816.
(3) [1895] 1 Q. B. 812.

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extorting money and committing a fraud on the bankruptcy laws; and they therefore held that on a petition so presented they ought not to make an order. That case is clearly no authority for the proposition for which it has been cited. For these reasons I think the appeal must be dismissed.

LOPES L.J. I am of the same opinion. The counsel for the debtor endeavoured to bring this case within s. 7, sub-s. 3 of the Bankruptcy Act, 1883, which provides that, "if the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition." It was said that this case came within the words "for other sufficient cause." I cannot think that the case is brought within the section. The contention is that, having regard to the facts of the case, it appears that nothing can be got by a bankruptcy for distribution among the creditors, and that that is a sufficient cause for dismissing the petition. In support of that contention the case of *In re Otway* (1) was cited. I desire to say that in my opinion that case is no authority for any such proposition. The grounds for the decision in that case are very easily understood. The Court thought that there was mala fides on the part of the petitioning creditor, and also that it was undesirable to allow the bankruptcy to proceed, because the debtor had a life interest in the income of certain property which would cease on bankruptcy, and which he proposed to apply in payment of a composition. On those two grounds, and on those only, the decision proceeded. On the other hand there is the case of *In re Hecquard*. (2) In that case it was said that, there being only one creditor, and the debtor having no assets, there could be no distribution of assets among creditors; but the Court said that it was impossible to say whether that was so until the proceedings had gone further and there had been a public examination of the debtor. In the case of *Ex parte Robinson* (3) the decision proceeded on the

(1) [1895] 1 Q. B. 812. (2) 24 Q. B. D. 71.
(3) 22 Ch. D. 816.

ground that there was already a bankruptcy in Scotland, and not merely on the ground that there were no assets in England. I agree that the appeal should be dismissed.

RIGBY L.J. I am of the same opinion. I agree entirely with the reasons which have been given by the other members of the Court. The decision in *In re Otway* (1) did not proceed on the ground that there appeared to be no assets at the time when the petition was presented. I do not think it was intended in that case to overrule what was said in *In re Hecquard.* (2) The observations of Lindley and Lopes L.JJ. in that case have been referred to, but what was said by the Master of the Rolls appears to me to put the matter in a nutshell. He said, "Then it is said that the debtor has no assets in England. It seems to me that that is a matter which could not be enquired into then. The question whether the debtor has or has not any assets depends upon a variety of circumstances."

Appeal dismissed.

Solicitors for debtor: *Stanley Attenborough & Tyser.*
Solicitors for petitioning creditor: *C. & S. Harrison & Co.*

(1) [1895] 1 Q. B. 812. (2) 24 Q. B. D. 71.

E. L.

C. A.
1896
March 6.

[IN THE COURT OF APPEAL.]

DUBOWSKI & SONS *v.* GOLDSTEIN.

Restraint of Trade—Agreement, whether Severable—Validity—Reasonableness.

By an agreement for the employment of the defendant by the plaintiffs in their business of dairymen, the defendant agreed that he would not, during the continuance of his service, or at any time thereafter, serve or solicit, or in any way interfere with, any of the customers who should at any time be served by or then belonging to the plaintiffs in the said business:—

Held, that the defendant's agreement must be construed as referring only to the business of dairymen as then carried on by the plaintiffs in a particular locality, and not to any other such business started by them elsewhere; and, by Lord Esher M.R. and Lopes L.J., that the agreement was severable and was good with regard to customers of the plaintiffs who were such while the defendant was in their service:

By Rigby L.J., and *semble*, by Lord Esher M.R., the agreement was good, both with regard to the above-mentioned customers and with regard to customers who became such after the termination of the defendant's service with the plaintiffs.

Appeal from the judgment of a Divisional Court (Vaughan Williams and Wright JJ.) on appeal from a county court.

The facts were as follows. The plaintiffs had brought an action in the High Court for damages and an injunction to restrain the defendant from breach of the after-mentioned agreement. The action had been transferred to the county court. The plaintiffs carried on the business of dairymen at several shops in Whitechapel and St. George's in the East, and the defendant had been in their employ. The agreement under which he was employed was in substance as follows. It purported to be made between B. Dubowski & Sons, of 106, Brick Lane, Spitalfields, East London (thereinafter called the "employer"), of the one part, and Levy Goldstein, of 46, Plumer's Row, Commercial Road, East London (thereinafter called the "employee"), of the other part, and, after reciting that the employer had, at the request of the employee, agreed to take him into his employment as a milk-carrier and general servant in his business of a dairyman, upon the terms and conditions

thereinafter mentioned, it witnessed that, in consideration of the wages to be paid to the employee by the employer, as thereinafter mentioned, the employee agreed with the employer as followed. The only terms of the agreement which need be set out were these: "1. That he will faithfully serve the employer his successors or assigns in the said business as a milk-carrier and general servant from April 30, 1892, and continue until such service shall be determined as hereinafter mentioned. 2. That the employee shall not nor will during the continuance of such service or at any time thereafter serve or cause to be served for his own benefit or for the benefit of any other person or persons or any company, either directly or indirectly, or solicit or in any way interfere with, or cause to be solicited or interfered with, any of the customers who shall at any time be served by or then belonging to the employer his successors or assigns in the said business." The defendant, after leaving the plaintiffs' employment, started in business as a milkman in the neighbourhood, and had served with milk and solicited customers of the plaintiffs. On the trial of the action the county court judge gave judgment against the defendant for 21*l.* damages, and granted an injunction restraining the defendant from serving or causing to be served for the defendant's own benefit, or for the benefit of any other person or persons, or any company, either directly or indirectly, or soliciting or in any way interfering with, or causing to be solicited or interfered with, any of the customers who should at any time be served by or belonging to the plaintiffs in their business as milkmen and dairymen. On appeal by the defendant the Divisional Court limited the injunction to persons who were customers of or belonging to the plaintiffs in their business as milkmen or dairymen at any time during the employment of the defendant by the plaintiffs. Against this judgment the defendant appealed, but there was no cross appeal by the plaintiffs.

A. H. Jessel, for the defendant. This agreement is bad as being in restraint of trade and going further than is reasonably necessary for the protection of the employer, and it is not severable as the Divisional Court held it to be. The case of

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Baines v. *Geary* (1), upon which they acted and in which a similar agreement was held to be severable, was not correctly decided. This agreement is too wide both as regards space and time. It is not limited with regard to space, but applies to any place at which the plaintiffs may at any time carry on their business as dairymen, however far from the district where it is now carried on. It cannot be reasonably necessary for the protection of a dairyman whose business must be local that the servant should be prohibited from dealing with customers over an unlimited area. This is not like the business carried on in the case of *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (2) Inasmuch as the agreement applies to customers of the plaintiffs who were not such while the defendant was in their service, it is clearly bad. There is no case in which such an agreement with regard to customers who become such after the termination of the service has been held good. The defendant cannot possibly tell who such customers are. Possibly if the agreement were confined to persons whom the defendant knew to be customers, it might be good, but, as it stands, it is unreasonable. In *Rannie* v. *Irvine* (3), Tindal C.J., and in *Nicholls* v. *Stretton* (4), Lord Denman C.J., appear to have thought that an agreement not to serve any persons who might at any time become customers of the employer would be too wide. As a matter of construction this agreement cannot be severed as suggested. It is an agreement not to interfere with "any of the customers who shall at any time be served by, or then belonging to the employer." Both of the phrases coupled by the disjunctive "or" include customers who become such after the termination of the defendant's service with the plaintiffs. [He cited *Price* v. *Green* (5); *Trego* v. *Hunt* (6); *Mills* v. *Dunham* (7); *Mumford* v. *Gething* (8); *Baker* v. *Hedgecock*. (9)]

E. Shortt, for the plaintiffs. The agreement is by necessary implication confined to the particular business carried on by the

(1) 35 Ch. D. 154.
(2) [1894] A. C. 535.
(3) 7 M. & G. 969.
(4) 10 Q. B. 346.
(5) 16 M. & W. 346.
(6) [1896] A. C. 7.
(7) [1891] 1 Ch. 576.
(8) 7 C. B. (N.S.) 305.
(9) 39 Ch. D. 520.

plaintiffs at the East End at the time when the defendant was employed by them. If the plaintiffs start a business at a place so remote from the district in which their original business was carried on that it would be substantially another business, the agreement would not apply to that business. The agreement is severable. It describes two classes of customers—customers at the time when the defendant is in the plaintiffs' service, and customers who become such afterwards. It is clearly good as to the former class.

A. H. Jessel, in reply.

LORD ESHER M.R. The defendant, who was employed by the plaintiffs in their business, entered into an agreement with them which for the purpose of deciding this case we have to construe. The Divisional Court, acting upon the construction which they put upon it, granted an injunction: and the question before us is whether that injunction can be supported. The agreement must be construed according to the ordinary canons of construction. It related to a business which the plaintiffs were carrying on and in which they proposed to employ the defendant. It was a business carried on, we are told, in Whitechapel and St. George's in the East, a well-known part of London. It is said that the plaintiffs carried it on at several shops, but they all appear to have been in that neighbourhood. As far as the milk-carrier is concerned, it is not carried on in the shops, but by carrying milk and selling it from door to door at the houses upon his walk. It was, I think, to that business in that district in which the defendant was to be employed to carry milk that the parties, when they made the agreement, were referring. It is an ordinary canon of construction that the meaning of words in an agreement which, taken by themselves, are quite general may be confined to a particular subject-matter with which the parties were dealing. Here, I think, the parties to the agreement were dealing with the business then carried on by the plaintiffs in Whitechapel and St. George's in the East, and the scope of this agreement must be limited by reference to that locality. If another business were set up by the plaintiffs in a

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wholly different locality, this agreement would not, in my opinion, apply to it. I cannot but think that, if the plaintiffs set up a business, say, for instance, in South Kensington or Hammersmith, or any place so remote that the milk could not be supplied or the business carried on from the shops at the East End, or by the servants employed there, but it would have to be carried on by other servants and with milk supplied from other sources, that would not be the same as the business referred to in the agreement, but another business. Therefore the scope of the agreement appears to me to be limited in point of locality. There are two classes of customers who, as it seems to me, are distinctly pointed to by this agreement, and both of whom the defendant undertakes not to interfere with or entice away after he has left the service of the plaintiffs, one being those who were customers while he was in the plaintiffs' employ, and who would, therefore, be known to him as their customers, and the other being those who might become customers after his service was determined. He has interfered with the plaintiffs' customers, and in respect of this breach of his agreement an injunction has been granted. The injunction as granted in the county court applied to both these classes of customers. Against that injunction there was an appeal to the Divisional Court, who, acting upon the decision of North J. in *Baines* v. *Geary* (1), by which they thought themselves bound, although they seem to have had doubts as to its correctness, restricted the injunction to customers who were such during the time when the defendant was in the plaintiffs' employment. We are not concerned with the decision in *Baines* v. *Geary* (1), but must determine the case before us according to the principles of law which are now established as applicable to cases of this kind. The general principle of law on the subject is that an agreement of this kind is valid if it goes no further than is necessary for the protection of the employer in his trade. I am inclined to think that it was reasonable that this agreement should be made with regard to both classes of customers, and, if so, the injunction in the larger form granted by the county court could be supported. The defendant of course cannot

(1) 35 Ch. D. 154.

complain that the terms of the injunction are narrower than those to which the plaintiffs are entitled. Therefore on that view we could not interfere with the injunction granted by the Divisional Court. But, assuming that the agreement, so far as it related to customers of the plaintiffs who became such subsequently to the defendant's leaving their service, went beyond what was reasonably necessary for the employer's protection, then I think that, on the true construction of the agreement, there being two classes of customers described therein, it may be severed, and the injunction may be granted as to that class of customers with regard to which it is reasonable that the employer should be protected, namely, the customers who were such while the defendant was in the plaintiffs' employment. Therefore in either point of view the injunction granted by the Divisional Court is right.

LOPES L.J. This is an agreement in restraint of trade, and the general principle to be deduced from the authorities is that, in determining whether such an agreement is valid, the question is whether, under all the circumstances of the case, the restraint is or is not greater than was necessary for the protection of the employer in whose favour the agreement was made. This agreement, like all others, must be construed with regard to the surrounding circumstances. It has been objected to as being too wide in two respects: first, in respect of space; secondly, in respect of time. I think the first objection fails when the agreement is carefully considered. On reading it I come to the conclusion that it must have reference to the business as carried on at that time by the plaintiffs in a particular locality. With regard to the second objection, if the agreement were not severable, I should have a difficulty in holding that the injunction granted by the Divisional Court was right. But, construing the agreement as I think it ought to be construed, it has reference to two classes of customers, one being those who were the plaintiffs' customers at a time when the defendant was in the plaintiffs' employment, and the other those who became their customers after his service was terminated. I doubt whether this agreement construed

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as an agreement not to serve or solicit any persons who at any time were the plaintiffs' customers would not go beyond what would be reasonably necessary for the protection of the employers, but I think that, upon the terms of it, a distinction may be made between the two classes of customers. There is no doubt that it is reasonable that the plaintiffs should be protected with regard to customers who were such at a time when the defendant was in their employment. I think the agreement may be severed, and that portion of it which relates to customers who became such after the defendant had left the plaintiffs' service may be rejected, and therefore the plaintiffs are entitled to the protection given them by this injunction.

RIGBY L.J. In my opinion this appeal fails. I have no doubt, speaking for myself, that, even if the agreement were not severable, it would be valid, and that an injunction might be granted in the terms of that originally granted by the county court. We have now gone far beyond what was supposed to be the law in the time of Tindal C.J. and Lord Denman C.J. I am not surprised that at that time they expressed the opinions they did. Lord Watson has pointed out in the case of *Nordenfelt* v. *Maxim-Nordenfelt Guns and Ammunition Co.* (1) that the opinion of the judges of this age as to matters of public policy may differ very much from that of judges of a bygone age when the circumstances of the world were different. The only test of the validity of an agreement in restraint of trade now is whether or not such an agreement is reasonably necessary for the protection of the person with whom it is made. If, applying all proper tests, it appears to be so, then it is no longer considered void as being against public policy, though it may be in a certain sense in restraint of trade. In the first place, I have no doubt that this is not an agreement with regard to the business of a dairyman in any part of England where the plaintiffs may carry it on, and that it is restricted to a certain locality. In the case of a large dairy business, like that of the Aylesbury Dairy Company, the business might extend over such an area as the whole county of London, but

(1) [1894] A. C. 535.

even that business would be limited to a locality, and there are numbers of cases to shew that, even where a business extends over a larger area than that, such an agreement as that now in question may be good. In this case we do not know precisely the locality of the business as carried on when the agreement was entered into. We have been told that it was carried on in Whitechapel and St. George's in the East, but it would create no difficulty in my mind if it extended somewhat beyond the limits of those districts. The agreement must mean, I think, the business whatever it was which the plaintiffs were then carrying on, and in which the defendant was to be employed. A man who is carrying on a business as a dairyman in a certain neighbourhood, when he enters into an agreement with reference to the business, does not mean the business of a dairyman wherever he may happen to carry it on, but the actual business he is carrying on at the time of the agreement. An altogether new business in a new place is not within the contemplation of the parties, and the agreement ought not to be construed as applicable to such a business. If a man who had carried on a large dairy business in London then went to Brighton or some other place equally remote and started a business of the same kind there, I should say that that would be a new business. A migration to a less distance might suffice to constitute a new business. In this case I think the business contemplated was limited to a certain locality. I cannot tell exactly what the locality was, but I think it is capable of being ascertained. I think that some limitation of locality is involved in the very nature of such an agreement as this—namely, an agreement not to serve or solicit customers in a business like that of a dairyman. The agreement by the defendant is that he will not during his service with the plaintiffs or afterwards serve or interfere with customers "who shall at any time be served by or then belonging to the employer in his said business." I conceive from the use of the words "shall at any time be," as governing not only the words "served by," but also the words "then belonging," that persons who have been customers but are such no longer are excluded, and that the agreement is only not to interfere with persons who are actually

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customers at the time. It is said that the defendant would have a difficulty in knowing who were customers. That is a difficulty which practically must occur in such cases. But the defendant can easily avoid it by going out of the district. If on the contrary he chooses to open a shop in the immediate neighbourhood of his former employers' place of business, he cannot complain of being placed in this difficulty. It is his own fault, for the whole of the rest of England was open to him. The contention that he could not contract not to serve persons whom he did not know to be the plaintiffs' customers is clearly not tenable as the law now stands. It would involve the conclusion that such an agreement as this could not be valid if made with a large company such as the Aylesbury Dairy Company. It is impossible that any one man in their employ should know all their customers. So it would come to this, that no servant taken into the employment of such a company could make an agreement like this. The result at which I arrive is that it was reasonably necessary for the complete protection of the plaintiffs within the meaning of the cases on the subject that the defendant should undertake never to interfere with those who at any time were actually existing customers of the plaintiffs; and therefore the agreement is valid in its entirety and no severance is necessary. Upon that view the question does not arise whether such a severance could be made. The plaintiffs have not appealed, and therefore it is not necessary for me to pronounce any opinion on that question. It may be necessary on a future occasion to consider whether in his judgment in *Baines* v. *Geary* (1) North J. rightly applied the general principles which he enunciated with accuracy to the circumstances of the particular case. For the reasons I have given I agree in the conclusion that this appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *T. R. Watson.*
Solicitor for defendant: *E. N. Adler.*

(1) 35 Ch. D. 154.

E. L.

THE QUEEN *v.* WEBB AND OTHERS, JUSTICES, AND GROVE.

1896
March 23.

Bastardy—Service of Summons—Putative Father out of Jurisdiction—"Last Place of Abode"—Bastardy Laws Amendment Act, 1872 (35 & 36 *Vict.* c. 65), *s.* 4.

By the Bastardy Laws Amendment Act, 1872, s. 4, after the birth of a bastard child, on proof that the summons was left at the last place of abode of the person summoned, six days at least before the petty session, the justices may make an order.

Shortly after the birth of a child the person alleged to be the father left the house where he had up to that time resided, and went to America, but the evidence did not shew that he had any place of abode in America. Ten days after the birth a summons was left at the house where he had resided:—

Held, that this house was his last place of abode within the meaning of the Act, and the service was sufficient.

Dictum of Lord Selborne in *Berkley* v. *Thompson* (10 App. Cas. 45, at p. 49) explained and distinguished.

An order nisi had been obtained, on behalf of William Harry Hotchkiss, calling upon certain justices of the county of Stafford, and Caroline Sarah Grove, to shew cause why a writ of certiorari should not issue to remove a bastardy order, made by the justices on July 1, 1895, into the High Court, and to quash the order, on the ground that the justices had no jurisdiction to make it, because the summons was not duly served within the meaning of s. 4 of the Bastardy Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), and because, when the summons was issued, and alleged to be served, the defendant's place of abode was in America, and the order was made in his absence, and without notice to him, and without his knowledge.

The facts appearing from the affidavits, so far as they are material to the question of law decided by the Court, were as follows.

The applicant for the summons, Caroline Sarah Grove, had been a servant at the Sun Inn at Cradley in Staffordshire, which was kept by the father of Hotchkiss. On March 31,

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1895, she was delivered of a bastard child. A day or two after the birth of the child Hotchkiss, who up to that time had resided at the Sun Inn, left the house, with the intention of going to America. On April 9 a bastardy summons was issued against Hotchkiss, and on April 10 the summons was left at the Sun Inn. At the adjourned hearing a letter from Hotchkiss dated April 16, and written at Philadelphia, was produced; but the evidence did not satisfy the Judges in the Divisional Court that Hotchkiss had acquired any place of abode in America. Ultimately the justices made the order which it was now sought to quash.

The clause in s. 4 of the Bastardy Laws Amendment Act, 1872, on which the decision turned, is set out at the beginning of the judgment of Lawrance J.

T. Willes Chitty, for the justices, shewed cause. The summons was sufficiently served, within the meaning of 35 & 36 Vict. c. 65, s. 4. The Sun Inn, where it was left on April 10, and where Hotchkiss had resided until after the birth of the child, when he left to go to America, was his "last place of abode." He is not shewn to have acquired any place of abode in America, and the fact that he has gone out of the jurisdiction is immaterial: *Reg.* v. *Damarell* (1); *Reg.* v. *Farmer*. (2)

The Court called upon

Ernest Pollock, who appeared for the defendant in support of the order nisi. *Reg.* v. *Damarell* (1) was decided before the passing of the Bastardy Laws Amendment Act, 1872.

[LAWRANCE J. The terms of the statute on which that case was decided were identical with those of the Act now in force.]

Reg. v. *Farmer* (2) is really opposed to the contention on behalf of the justices, because there, as here, the person served had gone to America, and the service was held invalid. The judgment of Lord Selborne in the House of Lords in *Berkley* v. *Thompson* (3) points in the same direction. He said: "It is impossible to read that provision" (s. 3 of the Act of 1872) "without seeing that this legislation proceeds upon the footing

(1) L. R. 3 Q. B. 50.
(2) [1892] 1 Q. B. 637.
(3) 10 App. Cas. 45, at p. 49.

that the presence of the putative father in England is necessary for the jurisdiction to attach; . . . . because the general principle of law is, 'Actor sequitur forum rei'; not only must there be a cause of action of which the tribunal can take cognizance, but there must be a defendant subject to the jurisdiction of that tribunal; and a person resident abroad, . . . and not brought by any special statute or legislation within the jurisdiction, is primâ facie not subject to the process of a foreign court—he must be found within the jurisdiction to be bound by it." This passage was cited with approval in *Reg.* v. *Farmer* (1) by Kay L.J., who said: "As at present advised, I agree with the opinion expressed by Lord Selborne in *Berkley* v. *Thompson* (2), that in the absence of the putative father from England, the Act does not provide for service of the summons, especially looking at the provisions of s. 3, giving power to take proceedings within twelve months next after his return to England." These authorities shew conclusively that, where the party summoned is out of the jurisdiction, service as effected in the present case is insufficient. [He also referred to *Reg.* v. *Evans.* (3)]

T. Willes Chitty, on behalf of the justices, was heard further. The passage relied on in Lord Selborne's judgment was unnecessary to the decision of the case then before the House of Lords, and applied to different facts from those of the present case. It was not followed by either Lord Esher M.R. or Lopes L.J. in *Reg.* v. *Farmer.* (4) That case is distinguishable because there it was expressly found as a fact that the man served had a place of abode at his brother's house in America. Sect. 4 of the Act expressly provides that an order may be made "on proof that the summons was . . . . left at his last place of abode." The contention on the other side would read in the words "in England."

Colam, for the complainant.

LAWRANCE J. I am of opinion that this order nisi ought to be discharged. The whole question turns on s. 4 of the Bastardy

(1) [1892] 1 Q. B. 637, at p. 642.
(2) 10 App. Cas. 45.
(3) [1896] 1 Q. B. 228.
(4) [1892] 1 Q. B. 637.

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Laws Amendment Act, 1872 (35 & 36 Vict. c. 65), by which, "After the birth of such bastard child, on the appearance of the person so summoned, or on proof that the summons was duly served on such person, or left at his last place of abode, six days at least before the petty session," the justices shall hear the evidence, and may make an order. The facts here are that the man had been living at the same place where the woman was living until after the birth of the child, when he left to go to America. On April 10 the summons was served by leaving it at the Sun Inn, where he had been residing until he went away, and the question which we have to determine is whether that was his last place of abode, within the meaning of s. 4. Mr. Pollock, in supporting the order nisi, was driven to contend that, if he were living anywhere not in England when the summons was served, that would be his last place of abode. As to this question, I am of opinion that the case of *Reg.* v. *Farmer* (1) is conclusive. There the service was held invalid, but the Master of the Rolls and Lopes L.J. both make a distinct point that the person served had a place of abode in America. Lopes L.J. said: "I think, on the evidence, that his father's house was not his last place of abode at the date of the summons, but his brother's house in America." (2) That is a distinct statement. Lord Esher M.R. also said: "Then we come to the question of the construction of the 4th section, and must determine whether the expression 'last place of abode' means last place of abode in England, though he has at the time a place of abode abroad. I take it that if a man goes to a new place of abode in England, his last place of abode is that to which he goes, and in which he is abiding. Does it make any difference that the place of abode is abroad, where the man is not merely wandering about, but has got a fixed place of abode? I think not. I do not see anything to justify the introduction into the section of the words 'in England.' If I am right as to this, it is sufficient to determine the case, because we have come to the conclusion that this man had a place of abode in America." (3) Therefore in that case it was found as a fact

(1) [1892] 1 Q. B. 637. (2) [1892] 1 Q. B. at p. 641.
(3) [1892] 1 Q. B. at p. 640.

that the person served had a place of abode in America, but in the present case I am unable, on the evidence, to come to the same conclusion. The dictum of Lord Selborne in *Berkley* v. *Thompson* (1), which has been referred to, was not necessary to the decision, and had reference to facts altogether different from those of the present case. If we were to accede to the contention founded on that dictum, we should be making the whole of the reasoning of the judgment of the Master of the Rolls in *Reg.* v. *Farmer* (2) unnecessary. He referred to the point in the last paragraph of his judgment, but expressly abstained from deciding it.

For these reasons, I have come to the conclusion that the order nisi ought to be discharged.

COLLINS J. I am of the same opinion. The question is whether this summons was served at the last place of abode of the person to whom it was directed. It seems to me that the Sun Inn was his last place of abode unless he had acquired another place of abode; I am satisfied, on the evidence, that he had not, and therefore that this was his last place of abode, within the meaning of s. 4.

Another point has been taken. The defendant was out of the jurisdiction when the summons was served, and it is contended that the dictum of Lord Selborne in *Berkley* v. *Thompson* (3), which has been referred to, shews that the service was invalid, and it is said that in *Reg.* v. *Farmer* (4) Kay L.J. expressed his agreement with that view. I am of opinion, however, that s. 4 absolutely entitles the applicant to have the summons served at the man's last place of abode, for the section says nothing about the person served being within or out of the jurisdiction. I also think that the provisions of s. 3 are not inconsistent with this view. The same conclusion is supported by the ratio decidendi in *Reg.* v. *Farmer*. (2) Lord Esher M.R. said in that case: "We have to consider whether he had at the time the summons was served a place of abode in America. If he went there with the intention of returning, or for the mere

(1) 10 App. Cas. 45.
(2) [1892] 1 Q. B. 637.
(3) 10 App. Cas. 45, at p. 49.
(4) [1892] 1 Q. B. 637, at p. 642.

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Collins J.

purpose of avoiding service, I should say he had no place of abode in America. In such a case it would be true to say that his last place of abode was his father's house." (1) This passage shews that if the facts of that case had warranted the conclusion that the last place of abode was the father's house, the Master of the Rolls would have held that the summons was rightly served. Lopes L.J. also said in the same case: "I agree that the case would be different had it been made out that he went away merely to avoid service, ... but of that I see no evidence, or that he went away merely for a temporary purpose." (2) That assumes that, in such a case as was there suggested, proceedings could be taken under s. 4. The dictum of Lord Selborne in *Berkley* v. *Thompson* (3) was uttered in a case where the point was whether service out of the jurisdiction was good, and it was directed to that question.

For these reasons it seems to me that, on the construction of s. 4, and on the case of *Reg.* v. *Farmer* (4), the dictum of Lord Selborne, which was relied on in support of the second point, does not apply.

Order discharged.

Solicitor for complainant: *Wainwright.*

Solicitors for defendant: *Charles Robinson & Co., for W. Waldron, Brierley Hill.*

Solicitors for justices: *Rowcliffes, Rawle & Co., for Bernard King & Sons, Stourbridge.*

(1) [1892] 1 Q. B. at p. 639.
(2) [1892] 1 Q. B. at p. 641.
(3) 10 App. Cas. 45.
(4) [1892] 1 Q. B. 637.

P. B. H.

RICHMOND HILL STEAMSHIP COMPANY *v.* CORPORATION OF TRINITY HOUSE.

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March 24.

Ship—Measurement of Tonnage—Deck Cargo—Horses and Cattle—Merchant Shipping Act, 1876 (39 & 40 *Vict. c.* 80), *s.* 23.

Live animals, such as horses and cattle, are "goods" within the meaning of s. 23 of the Merchant Shipping Act, 1876, which provides that where goods are carried as deck cargo all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods.

For the purposes of the computation of such tonnage, the measurement is to include only the space occupied by the animals themselves, fair allowance being made for their free bodily movements, and is not to include the shed or pens in which the animals are confined.

ACTION tried before Lord Russell of Killowen C.J. without a jury.

The plaintiffs are the owners of the steamship *Richmond Hill*, which is of the net registered tonnage of 2703 tons. The defendants are the collectors of light dues payable by vessels entering the port of London. The *Richmond Hill* on December 7, 1894, arrived in the port of London from New York, having on board a deck cargo consisting of seventeen horses and 350 head of cattle carried in covered pens on the deck. In pursuance of the provisions of the Merchant Shipping and other Acts, a surveyor of Her Majesty's Customs boarded the said ship for the purpose of ascertaining under s. 23 (1) of the

(1) By s. 23 of the Merchant Shipping Act, 1876, "If any ship, British or foreign, other than home trade ships as defined by the Merchant Shipping Act, 1854, carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable.

"The space so occupied shall be deemed to be the space limited by the area occupied by the goods and by straight lines inclosing a rectangular space sufficient to include the goods.

"The tonnage of such space shall be ascertained by an officer of the Board of Trade or of Customs, in manner directed by sub-section four of section twenty-one of the Merchant Shipping Act, 1854."

By s. 21, sub-s. 4, of the Merchant

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Merchant Shipping Act, 1876, the tonnage of the ship upon which (inter alia) light dues are payable, and measured the said deck cargo, consisting of horses, cattle, and cattle pens, in accordance with instructions issued by the Board of Trade, dated September, 1876. Those instructions are as follows: "The surveyor is to measure along the deck, the floor, or deck space covered by the cargo at its greatest length, and the greatest breadth of the floor or deck space covered by the cargo. He is then to observe and measure the highest point reached by the cargo. He is then to multiply together the greatest length, breadth, and height so taken, and to divide the product by 100, and the quotient is to be deemed to be the tonnage of the space. The measurements are to be taken in feet and tenths. The space occupied is to be limited by the extremes of 'straight lines inclosing a rectangular space sufficient to include the goods,' and for the measurement of such space, it is to be remembered, no 'means' such as are mentioned in sub-s. 4 of s. 21 of the Merchant Shipping Act, 1854, are necessary." The surveyor measured the extreme length, breadth, and height

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Shipping Act, 1854, "If there be a break, a poop or any other permanent closed in space on the upper deck available for cargo . . . . the tonnage of such space shall be ascertained as follows: Measure the internal mean length of such space in feet and divide it into two equal parts; measure at the middle of its height three inside breadths, namely, one at each end and the other at the middle of the length; then to the sum of the end breadths add four times the middle breadth, and multiply the whole sum by one-third of the common interval between the breadths; the product will give the mean horizontal area of such space. Then measure the mean height and multiply by it the mean horizontal area; divide the product by one hundred, and the quotient shall be deemed to be the tonnage of such space."

By s. 29, "The Board of Trade (see 35 & 36 Vict. c. 73, s. 3) may with the sanction of the Treasury appoint such persons to superintend the survey and admeasurement of ships as they think fit; and may make such regulations for that purpose as may be necessary; and also make such modifications and alterations as from time to time become necessary in the tonnage rules hereby prescribed, in order to the more accurate and uniform application thereof, and the effectual carrying out of the principle of admeasurement therein adopted."

All the above-mentioned sections have been re-enacted in the same terms by the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 77, sub-s. 7, s. 85, and Sched. II., r. 1 (5).

of the pens, taking in each case outside measurements, and the figures so obtained when multiplied together and divided by 100, gave a quotient of 328 tons. The defendants demanded from the plaintiffs the sum of 3*l.* 16*s.* 6*d.* for light dues payable in respect of the said 328 tons. The plaintiffs paid the amount under protest, claiming that live animals are not goods within the meaning of s. 23 of the Merchant Shipping Act, 1876, and that in any case a wrong principle of measurement was adopted. This action was then brought to recover back the money so paid. The questions for the opinion of the Court were :—

1. Whether the defendant corporation was entitled to charge the plaintiffs with any light dues in respect of the horses, cattle, and cattle pens as aforesaid carried upon the deck of the *Richmond Hill*.

2. If the Court should be of opinion that the defendant corporation was so entitled, whether the defendant corporation had employed the right system of measurement in ascertaining the amount of such dues.

Lawson Walton, Q.C., and *Holman*, for the plaintiffs. First, tonnage dues are not payable in respect of the horses and cattle, for they are not "goods" within the meaning of s. 23 of the Merchant Shipping Act, 1876. At the time when that Act was passed the only kind of cargo which was customarily carried on deck was wood cargo, and the Legislature when using in that section the words "timber, stores, or other goods" were presumably not referring to any other kind of cargo. By "stores" they meant wood stores such as spars, and by "other goods" they meant other wood goods.

Secondly, if horses and cattle are goods, a wrong principle of measurement was adopted in the present case. The surveyor measured the outside of the pens, which were practically permanent erections on the deck. Those pens were of much greater height than the animals they contained, and the cubic space occupied by the pens was consequently far greater than that occupied by the animals themselves. It was the latter space alone that ought to have been measured.

Bucknill, Q.C., and *Butler Aspinall*, for the defendants. The

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words "other goods" are wide enough to include horses and cattle. Where the Legislature in the Act of 1876 mean to refer to wood goods as distinguished from other classes of goods, they expressly use the term "wood goods," as in s. 24.

Secondly, the correct principle of measurement was followed. It could not be disputed that in the case of dry goods packed in cases, if such cases were carried on deck, the surveyor would have to measure the outsides of the cases themselves, and not merely the goods they contained. The same principle must be applied to animals in pens—the measurement of the animals must include the pens. Any other mode of measuring a large number of restless animals would be impracticable. Sect. 23 provides that the measurement shall be conducted in the manner directed by s. 21, sub-s. 4, of the Act of 1854. That must mean in the manner so directed, with such modifications as may be prescribed from time to time by the Board of Trade under their powers contained in s. 29 of the Act of 1854. The Board of Trade have in the exercise of those powers issued regulations modifying the manner of measurement; and it was in accordance with such regulations that the measurement in the present case was made.

LORD RUSSELL of KILLOWEN C.J. In this case there are two questions which I have to decide. The first is whether the defendants are entitled to charge the plaintiffs with any light due at all in respect of horses and cattle and cattle pens carried on the deck of the *Richmond Hill*. The answer to that question depends on the construction to be put on s. 23 of the Merchant Shipping Act, 1876. The language of that section is as follows: "If any ship . . . . carries as deck cargo, that is to say, in any uncovered space upon deck, or in any covered space not included in the cubical contents forming the ship's registered tonnage, timber, stores, or other goods, all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods at the time at which such dues become payable." In the present case there was undoubtedly a covered space upon the deck not included in the cubical contents forming the ship's

registered tonnage, and in that covered space there were carried a certain number of horses and of head of cattle. The question, therefore, is whether those horses and cattle were goods within the meaning of the section. I can see no reason to doubt that they were. It may well be that the particular class of deck cargo which was present to the minds of the Legislature when framing that section was wood cargo, owing to the fact that that was the only kind of cargo which was customarily carried on deck at the date when that Act was passed. But that does not conclude the matter. If since that date a practice has grown up of carrying upon deck other kinds of cargo besides wood cargo, and the language used in the Act is apt language to apply to such new kinds of deck cargo, the Act must be held to apply to them none the less because they were not directly within the contemplation of its framers. And here I am of opinion that the language of s. 23 is apt to include such a cargo as horses and cattle. The first question, therefore, so far as it relates to the horses and cattle, must be decided in favour of the defendants. Then arises the second question, as to the principle upon which the calculation of the added tonnage is to be made. It appears that the surveyor who measured the deck cargo in the present case, following the instructions that for some years past have been given by the Board of Trade to its officials, took the outside length, height, and depth of the shed in which the horses and cattle were contained, multiplied those figures together, and divided by 100, and treated the quotient as the number to be added to the ship's registered tonnage in respect of the deck cargo. And he, moreover, admitted that he would have measured the shed in precisely the same manner if, instead of horses and cattle, it had contained sheep or pigs. In my judgment that principle of measurement is wrong. No doubt under s. 29 of the Merchant Shipping Act, 1854, the Board of Trade are given power to make such regulations for the measurement of ships as may be necessary. But, as was very properly admitted by the counsel for the defendants, if the Act of 1876 has expressly laid down a principle upon which a specific measurement is to be made, the general power of making regulations as to measurement given

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by the Act of 1854 would not authorize the Board of Trade to make a regulation inconsistent with the principle so expressly laid down in the later Act. And I think that the Act of 1876 does lay down a principle for the measurement of deck cargo with which principle the Board of Trade regulations seem to be inconsistent. Sect. 23 provides that, for the purpose of ascertaining the amount of dues payable in respect of deck cargo, there is to be added to the ship's registered tonnage "the tonnage of the space occupied by such goods at the time at which such dues become payable." You are to add, not the cubical contents of the erection on the deck—an erection which may be either temporary or permanent—but the space occupied by the goods, and you are to measure such space at the time at which the dues become payable. For instance, if you had a shed on deck capable of holding a hundred head of cattle, and the ship started on her voyage with the shed full, but owing to disease or some other cause fifty of the number had to be jettisoned in the course of the voyage, so that when the ship arrived, which is the time when the dues become payable, there are only fifty head left on board, you would have to compute the tonnage only of the space occupied by the fifty that remain. So, too, if you have an erection on deck which for the purposes of the health of the cattle or of ventilation gives a great deal of head-room to the cattle, you are not entitled to take into consideration for the purpose of these measurements the space clear above the free movements of the cattle. And if, instead of having bulky animals like cattle or horses in your shed, you have got sheep or pigs, you are to measure the smaller space occupied by the smaller animals. What the surveyor in my opinion is bound to do is to measure, not the sheds, but the space occupied by the animals themselves, making reasonable allowance for their free bodily movements. If, indeed, there are animals of different height and length, such as horses and cattle, in the same shed, he is not bound for the purposes of his measurement to take an uneven line, and say that in relation to the horses it would be such a line, and in relation to the cattle it would be another. He is entitled, for the purposes of the computation of the horizontal area, to measure a rectangular

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space, the depth of which shall be something in excess of the longest animal contained in it, and he is entitled also to take a uniform height sufficient to allow fair head-room for the tallest of the animals. This seems to me the proper principle to apply. In the absence of any evidence as to the precise difference which the application of such principle would make in the amount of the light dues properly payable by the plaintiffs, I will assume that difference to amount to 1*l.*, and I accordingly give judgment for the plaintiffs for that sum.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Downing, Holman & Co.*
Solicitors for defendants: *Sandilands & Co.*

J. F. C.

THE QUEEN *v.* SODEN.

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Parliament—Franchise—Registration—Revising Barrister closing List—6 & 7 *Vict. c.* 18, *s.* 41—28 & 29 *Vict. c.* 36, *s.* 15.

A notice of the revision of the lists of parliamentary and municipal electors of a borough stated that the lists for a certain parliamentary division of the borough would be closed at a certain sitting of the revision court. At the termination of that sitting the revising barrister, having ascertained that there were no other claimants or persons objected to present who desired to be heard, declared the list closed. On the following day he proceeded in open court to read out and to initial the names expunged or inserted by him in the list. Certain claimants, on their names being thus read out, applied then for the first time to be heard in support of their claims. The revising barrister declined to hear them on the ground that they were then too late, and expunged their names from the list:—

Held, that the claimants had, under the circumstances, no right to be heard.

RULE NISI for a mandamus to a revising barrister to hear and determine the claims of the applicants to be included in a list of parliamentary electors or to state a case.

The revising barrister for Leeds, in accordance with a practice which had been adopted since the year 1887, issued a notice on September 4, 1895, that courts would be held for the revision of the lists of parliamentary electors and burgesses for the

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east division of the borough on Monday, September 16, 1895, at 6.15 P.M., and on Tuesday, September 17, at 10.30 A.M. and at 6.15 P.M., and that the lists would close at the evening sitting on September 17. At the termination of the evening sitting on September 17 the revising barrister, being informed by the agents and having satisfied himself by inquiries in open court that there were no more claimants or persons objected to present, declared the list closed, with the exception of two or three cases of persons who had appeared, and whose cases he had adjourned at the request of the agent until the following day for the production of further evidence. On these cases being called on on the following day the agent informed the revising barrister that he had abandoned the claims; and the revising barrister then proceeded in open court to expunge and write his initials against the names of those who had not appeared or otherwise established their claims, and to call out the list, stating the claims which were allowed and those which were struck out. On the names of John Kelly and James O'Brien being called, they rose and tendered themselves as witnesses, and requested to be heard in support of their claims. It was not suggested that they had attended to support their claims at any of the previous sittings, or that their cases had been adjourned. The revising barrister refused to hear them or an agent on their behalf, and proceeded to expunge their names from the list. Their agent then applied in writing to the revising barrister to state a special case on the question whether he was bound to hear evidence in support of their claims. The revising barrister refused the application. They then obtained this rule nisi from the vacation judge in chambers.

W. Graham, for the revising barrister, shewed cause against the rule. The revising barrister must have power to make arrangements for the conduct of the business of his court. Great injustice would be done if the revising barrister had heard the applicants after the list had been declared to be closed. He had in fact adjudicated upon their claims, and all that remained to be done was to expunge and read out their names in accordance with the directions of 6 & 7 Vict. c. 18, s. 41, and 28 & 29

Vict. c. 36, s. 15. The revising barrister, having signed the lists, is functus officio, and no mandamus can go to him to hear and determine claims after the register has issued. He can no doubt, under 41 & 42 Vict. c. 26, s. 37, be directed to state a case notwithstanding any limitation of time; but there is here no point of law on which a case could be stated. [He cited *Brumfitt* v. *Bremner*. (1)]

Mattinson, Q.C. (*S. Mayer* with him), in support of the rule. The revising barrister ought to be directed to state a case on the question whether he was right in refusing to hear evidence in support of these claims. Until the list was called over the applicants had a right to be heard in support of their claims. Judgment was not delivered on those claims until the names were expunged and initialled by the revising barrister, and as long as the matter remained open the applicants had a right to be heard. There is power to grant a mandamus to revise a list of voters although the time limited has elapsed: *Reg.* v. *Mayor of Monmouth* (2); *Mayor of Rochester* v. *Reg.* (3)

LAWRANCE J. I am of opinion that this rule must be discharged. The sole point in the case is whether a revising barrister has or has not the right to manage the business of his own court. It is said that until a claimant's name is struck off the list he has a right to appear and be heard in support of his claim. On the other hand, it is contended that the revising barrister has a right to make such arrangements of the business of his court as will be for the public convenience. What happened was this: public notice was given that certain courts would be held for revision of the list for the Parliamentary Division of East Leeds, and that that list would be closed at the evening sitting on September 17. The revising barrister, carrying out the duties imposed on him by s. 41 of 6 & 7 Vict. c. 18, heard and determined in open court the validity of the claims and objections before him. It is not disputed that all the persons who were present at the sittings fixed by him and who desired to be heard were heard; and at the evening sitting on

(1) 30 L. J. (C.P.) 33. (2) L. R. 5 Q. B. 251.
(3) E. B. & E. 1024; 27 L. J. (Q.B.) 434.

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September 17 he satisfied himself, by asking the agents and by inquiry in open court, that there were no more persons who desired to be heard. He thereupon declared the list closed. The next day he proceeded to take the next step by going through the list in open court, and expunging or inserting the names of claimants as the case might be, and writing his initials against them. It seems to me that it makes no difference that he did this the next day. If he had gone on with the lists on the night of September 17 it is clear that no objection could have been taken. The only question is whether power is reserved to a person to appear and support his claim until the barrister's initials are placed against his name. Is the revising barrister bound to go through the list as he adjudicates on each claim, and strike out or insert the name and initial it at the same time? I think such a course would be very inconvenient, and that the revision would never come to an end in such a case. These people did not choose to appear at the sittings of which they had notice, and it seems to me that the barrister has the right to say how the business of his court shall be arranged, and that after the list was declared to be closed they had no right to insist on being heard. I do not say whether, even if they were right, they have adopted the proper course of raising the question. I am clearly of opinion that the rule must be discharged.

COLLINS J. I am of the same opinion. I feel very doubtful whether this application can be entertained at all. It is said that there is a point of law in respect of which the revising barrister ought to be ordered to state a case; but as to that I do not feel at all clear. If there is any remedy as to the other point raised, it must be by mandamus. I say nothing as to the difficulty of issuing a mandamus to a revising barrister who is functus officio and who has returned his nomination. It is possible that the issue of the writ might reclothe him with his functions temporarily, and that he might thus be enabled to hear and determine a claim if he was ordered to do so. I will only point out that the issue of a writ of mandamus is always a matter for the discretion of the Court. But I need say nothing

more as to this, for I am quite clear that the applicants have no case on either head of their application. The practice which has been adopted by the revising barrister in this case is one for the general convenience of the public, and not for that of the revising barrister himself. I myself have had to revise the lists of several large boroughs—Liverpool amongst the number—and to hold evening sittings, and I know how impossible it would be to adopt the course suggested, of going through the list at the same time as the claims are heard and adjudicated upon. Where the lists are so large, if people had to wait till their names were reached on the list, and their claims thus casually and intermittently dealt with, very great inconvenience would be caused. It was a method in use, no doubt, when the lists were smaller and more easily gone through; but it could not be adopted now. In the case of large boroughs the lists cannot be worked on any other method than that adopted by the revising barrister in this case. He quite properly and in the interest of the public laid down the rule that he would at certain sittings of the court deal with all claims and objections brought before him, and then would proceed with the clerical part of his work. Having announced this and acted on this practice, if these persons did not choose to come at any of the sittings fixed for adjudication, they had no right to be heard after the list was closed. In their absence the revising barrister had in fact decided against them, and, subject to the few excepted cases of which we have heard, the list had been agreed upon and closed on the evening of September 17. The revising barrister had, therefore, adjudicated upon their claims, and nothing remained for him to do but to expunge and initial their names. I do not think that the mere fact that this clerical and formal part of the business still remained to be done gave any right to the applicants to appear and insist on being heard in support of their claims.

Rule discharged.

Solicitor for applicants: *A. Scott Lawson, for Walter & E. H. Foster, Leeds.*

Solicitors for respondent: *Hickin, Smith & Capel Cure.*

A. P. P. K.

C. A.
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Jan. 23, 24.

[IN THE COURT OF APPEAL.]

CREMER *v.* LOWLES.

(The Haggerston Election Petition.)

Parliament—Election Petition—Particulars—Offences subsequent to Date of Petition.

An election petition, after alleging that the respondent had been guilty of bribery, treating and undue influence, further charged him with the commission of "other corrupt and illegal practices before, during and after the election":—

Held, that it was not competent to the petitioner to include in his particulars, or to give evidence of, offences alleged to have been committed after the date of the petition, the petition not having been amended within the time limited for amendment.

Appeal from an order of Lawrance J. at chambers striking out certain particulars of charges contained in an election petition.

The petitioner and the respondent were the candidates at a parliamentary election for the Haggerston division of the borough of Shoreditch. The poll was taken on July 16, 1895, and at the close the respondent was declared to be duly elected. On August 7 the petitioner presented a petition against the respondent's return: the petition contained in the first part charges of bribery, treating, undue influence, and other specific offences alleged to have been committed by the respondent or his agents; while paragraph 14 contained an allegation of the commission of "other corrupt and illegal practices before, during and after the said election." On August 14 the respondent took out a summons asking for particulars, first, of the specific charges of bribery, treating, &c., and, secondly, of the general charges contained in paragraph 14; and on August 16 an order was made by Day J. at chambers that the petitioner should deliver particulars of the specific charges ten days before the day appointed for the hearing of the petition, and should deliver particulars of the nature of the general charges under paragraph 14 within seven days from the date of the order. On

August 19 the respondent filed his return of election expenses, and on August 23 the petitioner delivered his particulars of the general charges of corrupt and illegal practices under the order of Day J.: these particulars included allegations of illegal practices in connection with the return of election expenses. On October 22 the respondent took out a summons for further and better particulars of the general charges, and on October 25 Pollock B. made an order for the delivery of such further and better particulars ten days before the day fixed for the hearing of the petition. On January 14 particulars under this order were delivered by the respondent, and on January 22 application was made by the respondent to Lawrance J. at chambers to strike out certain of these particulars, that is to say, (1.) particulars of the alleged illegal practices in connection with the return of election expenses; and (2.) particulars concerning the alleged procuring of prohibited persons to vote at the election and concerning the providing of money for prohibited payments. (1) These particulars were struck out by Lawrance J. as not being covered by the petition, and the petitioner appealed.

Willis, Q.C. (*B. S. Foster* with him), for the petitioner. The particulars were improperly struck out, for the charges made by them are covered by the allegations in the petition. The petition makes, in paragraph 14, a general allegation of corrupt and illegal practices "before, during and after the election," and under such an allegation particulars of illegal practices in connection with the return of expenses may rightly be delivered. The petition must be presented not later than twenty-one days after the election, and in that time the petitioner in most cases does not acquire a knowledge of all the offences committed by the respondent; it is therefore the settled practice to include in the petition a general allegation of corrupt practices, under which the petitioner is entitled to give

(1) As regards the particulars comprised under head (2.) the Court of Appeal were of opinion that the question had not been really argued in chambers, and they declined to give any judgment upon that part of the appeal, but directed that it should go back to the learned judge for further argument. This report is therefore confined to the particulars comprised in head (1.).

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particulars of any offences coming to his knowledge before the hearing of the petition. The view that the petition should state the charges in general language, leaving the real information to be given by the particulars, is adopted by Cave J. in the *Pontefract Case.* (1) Further, if these particulars were improperly delivered in the first instance, the respondent has waived his right of objection to them by taking out the summons for further and better particulars.

Jelf, Q.C. (*Lewis Coward* with him), for the respondent, was stopped by the Court.

LORD HALSBURY L.C. I am of opinion that this appeal should be dismissed. The question for our determination arises on the objection that the charges founded on the return of expenses are not covered by the petition; to which it is answered that the charges made by the petition are so general in their character that they may be so enlarged by the particulars as to make new and independent charges. The language of the statute upon which the petitioner relies is "before, during and after the election," and especial reliance is placed on the word "after." But it must not be forgotten that the point of departure which has to be looked at is the election or return of the member, from which date twenty-one days are given within which a petition must be presented. The petitioner's contention seems almost unarguable. The charges dealt with in the statute and of which particulars may be ordered to be given are necessarily the charges made by the petition, and it is really impossible for us to hold that charges founded on events which have happened since the presentation of the petition can be said to be charges contained in the petition. The charges which are the subject of complaint when the petition is presented, and which are contained in the petition, cannot include matters which only happen after the petition has been presented. The petition itself says that the respondent "has been" guilty of certain offences; the language is in the past tense, and cannot include offences not then committed; it is impossible to reconcile those words with this attempt to shew that three weeks after

(1) Day's Election Cases, 129.

they were used the respondent committed another offence of a similar character and quality to the offences alleged against him in the petition. When once the matter is carefully looked at, it becomes clear that, if the petitioner's contention is right, the time limit of twenty-one days for the presentation of the petition is merely colourable; for if the trial of a petition did not come on for some months after its presentation, then a member petitioned against in August might be unseated for an offence committed in October and treated as an offence charged in the petition. The mere statement of such a possible case shews the hopeless nature of the petitioner's contention. I am therefore of opinion that by *this* petition it is not possible to proceed against the respondent in respect of charges of offences which did not come into existence until after the date of the petition.

It is said that the result of our decision is that offences committed subsequently to the presentation of the petition will escape without punishment; but this is incorrect. Any such offence may, under 46 & 47 Vict. c. 51, s. 40, be the subject of a charge against a member, which may be brought either by amendment of the petition within the time limited for amendment, or by a petition filed within the prescribed time after the offence was committed: if, for example, a petition were presented in August, and the respondent committed an illegal practice by payment of money in October, the petition could be amended and proceeded with. But it would be monstrous to say that upon a petition presented in August, charging the commission of offences in the past, evidence could be given of an offence committed three or four months after the date of presentation.

LOPES L.J. I am of the same opinion. The objection of the respondent is that the particulars relate to matters which are not covered by the allegations in the petition, and which in fact did not occur until after the petition was presented. The mere statement of this objection is sufficient to shew that these particulars were rightly struck out. The petition ought to shew, and does shew, offences which were then existent, and

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Lopes L.J.

the proper particulars which the petitioner is entitled to give are particulars of the offences alleged in the petition. The argument for the petitioner would make the petition prophetic, and I cannot help thinking that sufficient effect is not given by it to the words "before, during and after the election," although those are the words chiefly relied upon; it treats the word "election" as though it were "petition." It is quite right that matters which have happened after the election should be included in the petition; it is very different with regard to matters which do not happen until after the presentation of the petition itself. There is no hardship in what we are deciding, for these offences might have been made the subject of an amendment or of a substantive petition, had the limitation of time for those steps been observed.

RIGBY L.J. I am of the same opinion. By no conceivable process of reasoning can things which have not occurred be made to fall within an allegation that things have previously occurred: that consideration really decides the matter at once. A petitioner may rely in his petition on things which have occurred before, during and after the election; he cannot rely upon, or give particulars of, something which has not occurred. It has been argued that the respondent, by taking out a summons for further and better particulars, has waived this objection; but no waiver, no agreement even, could turn particulars of what had not happened at the date of the petition into particulars of what had happened at that date. The petitioner ought to have exercised the power of amending the original petition or presenting one founded on the offences complained of within the time limited for so doing.

Appeal dismissed.

Solicitors for petitioner: *H. P. & J. H. Cobb.*
Solicitors for respondent: *Rollit & Sons.*

W. J. B.

In re ARTON (No. 2).

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Jan. 18, 20; *Feb.* 8.

Criminal Law—Extradition—Falsification of Accounts—"Faux"—"Faux en Ecritures de Commerce"—Extradition Treaty with France, Art. 3 (2, 18)—*Code Pénal, Art.* 147—*Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 83—*Falsification of Accounts Act*, 1875 (38 & 39 *Vict. c.* 24).

The offence in English law of fraudulent falsification of accounts by a director, public officer, or member of a public company is an offence within art. 147 of the French Code Pénal, and is covered by the expression "faux en écritures de commerce" in that article. Although it may not amount to forgery according to English law, that offence is an extradition crime within the French version of art. 3 (2) of the extradition treaty with France, and within the English version of art. 3 (18) of the same treaty, and also within the Extradition Acts.

ARGUMENT of an order nisi for a writ of habeas corpus. The proceedings on the application for the order nisi are reported ante, p. 108, where a short statement of the facts and of the grounds of the motion will be found. The following statement of the facts is taken from the written judgment of the Lord Chief Justice :—

In this case the French Government demanded the extradition of Arton under the treaty between the Queen and the French Republic, signed in 1876 and ratified in 1878. The demand was based on the allegation that Arton had committed a number of crimes against the law, and in the territory, of France, which are extradition crimes within the treaty. On December 6, 1895, after inquiry before him, the chief metropolitan magistrate made a committal order to Holloway Prison with a view to Arton's extradition in respect of the accusation against him of the commission of the crimes of "faux (falsification of accounts and using falsified accounts), fraud by an agent, fraud by a trustee, fraud by a director and public officer of a company, obtaining money and goods by false pretences, crimes by a bankrupt against bankruptcy law, larceny and embezzlement within the jurisdiction of the French Republic." It is in reference to the first of these charges only that any question arises.

Subsequently, on December 21, 1895, this Court, on the application of Arton's counsel, granted an order calling on the

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governor of Holloway Prison to shew cause why a writ of habeas corpus should not issue. The application was in argument based on the allegation that the chief magistrate had come to the conclusion that no forgery, according to English law, had been committed in the falsification of accounts and in the using of falsified accounts imputed, and it was therefore contended that he could not properly commit Arton for "faux," the French equivalent or translation of "forgery"; and, further, that he could not properly commit for such falsification on two grounds: (1.) because the falsification was not in the order of committal described as committed by Arton as a director, officer, or member of a public company, or as a clerk, officer, or servant, which would be necessary to constitute falsification a crime according to English law; and (2.) that even if the order of committal were amended in this respect he could not properly commit for falsification on the ground that such falsification is not an extradition crime within the treaty.

Jan. 18, 20. *The Attorney-General* (*Sir R. E. Webster, Q.C.*), and the *Solicitor-General* (*Sir R. B. Finlay, Q.C.*), (*H. Sutton* with them), shewed cause. Admitting that under s. 10 of the Extradition Act, 1870, an extradition crime must be a crime both in the demanding and the surrendering country, the crime of "faux," as paraphrased in the order of committal, is a crime both under English and French law, and is within the terms of the extradition treaty with France; construed according to French law, it includes falsification of accounts, which is a crime in England. The English and French versions of the treaty are obviously not translations of each other, and each country must be taken to have agreed to both versions, for it is impossible to find legal terms in the two systems of law which exactly correspond to each other. (1) "Faux" means more

(1) The following are the English and French versions respectively of the 2nd and 18th heads of art. 3 of the treaty.

"2. Forgery, counterfeiting or altering and uttering what is forged, counterfeited or altered."	"2. Faux ou usage de pièces fausses; contrefaçon des sceaux de l'Etat, poinçons, timbres et marques publics, ou usage des dits sceaux, poinçons, timbres, et marques publics contrefaits."
"18. Fraud by a bailee, banker,	"18. Abus de confiance ou détourne-

than "forgery" means in English law, and includes offences by English law not amounting to forgery: this is clear from a consideration of the last clause of art. 147 of the Code Pénal, which would cover the offence of falsification of accounts. (1) Falsification of accounts is also an offence in England under the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24), when committed by a clerk, officer, or servant, and falsification of books or accounts by a director, manager, public officer or member of a body corporate or public company is an offence under s. 83 of the Larceny Act, 1861 (24 & 25 Vict. c. 96); the later Act is to be read as one with the earlier; both these sections clearly make that an offence which might not be either forgery or the using of forged documents. (2) Falsification of

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agent, factor, trustee or director, or member, or public officer of any company made criminal by any Act for the time being in force."

ment par un banquier, commissionnaire, administrateur, tuteur, curateur, liquidateur, syndic, officier ministériel, directeur, membre ou employé d'une société, ou par toute autre personne."

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(1) An affidavit of a French advocate was read on behalf of the Crown to the effect that the falsification of accounts charged against the prisoner constituted the offence of "faux" within the extradition treaty and within art. 147 of the Code Pénal. That article is as follows:—

Art. 147: "Seront punies des travaux forcés à temps, toutes autres personnes qui auront commis un faux en écriture authentique et publique, ou en écriture de commerce ou de banque—soit par contrefaçon ou altération d'écritures ou de signatures—soit par fabrication de conventions, dispositions, obligations ou décharges, ou par leur insertion après coup dans ces actes—soit par addition ou altération de clauses, de déclarations ou de faits que ces actes avaient pour objet de recevoir et de constater."

(2) By the Falsification of Accounts Act, 1875 (38 & 39 Vict. c. 24), s. 1, "If any clerk, officer, or servant . . . . shall wilfully and with intent to defraud destroy, alter, mutilate, or falsify any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or shall wilfully and with intent to defraud make or concur in making any false entry in, or omit or alter, or concur in omitting or altering, any material particular from or in any such book, or any document or account, then in every such case the person so offending shall be guilty of a misdemeanour . . . ."

By the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 83, "Whosoever, being a director, manager, public officer or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing, or valuable security belonging to the body corporate or public company, or

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accounts, being a crime by the law of both countries, is properly described in the order of committal by the term "faux," if proper words are inserted to limit the meaning of "faux" to the specific offence of which evidence has been given, and in respect of which the prisoner is committed for extradition; the word "faux" cannot be struck out of the committal, as that would necessitate an inquiry by the French Courts as to the English law regarding falsification of accounts. The language of the order of committal might, if thought desirable, be further limited by confining it to the crime of "faux en écritures de commerce" within art. 147 of the Code Pénal. The prisoner cannot be tried in France for any wider kind of "faux" than that specified in the order of committal; he can only be tried for a crime of "faux" of which evidence was given before the magistrate, and in respect of which the committal was made.

[They cited *In re Bellencontre* (1); *In re Windsor* (2); *Reg.* v. *Ritson.* (3)]

C. W. Mathews, in support of the rule. The committal is bad. The English legal equivalent of "faux" is "forgery," and the word is used in that sense in art. 147 of the Code Pénal. All the cases dealt with by that article would be triable in this country as forgery, either at common law or by statute; they are all cases of forgery of a very grave character. The order of committal does not describe any offence punishable by the law of England; it does not ascribe to the accused a confidential position in relation to the person injured. Falsification of accounts is not a crime within art. 147 of the Code Pénal, nor within the 18th head of art. 3 of the extradition treaty, which is confined to persons in certain special positions. The Act of 1875 has no application to the case, as the prisoner was not a clerk, officer, or servant within the meaning of that Act; moreover, offences under that Act are not covered by the 18th head of art. 3 of the treaty. There is nothing in the

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make or concur in the making of any false entry, or omit or concur in omitting any material particular, in any book of account or other document, shall be guilty of a misdemeanour. . . . ."

(1) [1891] 2 Q. B. 122.

(2) 6 B. & S. 522.

(3) L. R. 1 C. C. 200.

warrant to prevent the prisoner being tried for any form of "faux."

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Cur. adv. vult.

Feb. 8. The judgment of the Court (Lord Russell of Killowen C.J., Wright and Kennedy JJ.) was delivered by

Lord Russell of Killowen C.J. [After stating the facts as above set out, his Lordship proceeded:—]

Before proceeding to deal with these points it will be well to make clear what we understand are the admitted facts. It is true that the chief magistrate did, in fact, come to the conclusion that there was no evidence of forgery according to English law; but he also came to the conclusion that there was sufficient evidence of the commission by Arton of the crime of fraudulent falsification of accounts in his character of member and director of a public company according to English law, and that such falsification of accounts constituted the crime of "faux" or "forgery" against the law of France within the meaning of art. 147 of the Code Pénal. The omission to state the character in which the falsification was committed in the order of committal is not a point of substance. I proceed to consider the other alleged grounds.

The conditions of extradition, the fulfilment of which we have in this case to consider, are the following: (1.) the imputed crime must be within the treaty; (2.) it must be a crime against the law of the country demanding extradition; (3.) it must be a crime within the English Extraditions Acts, 1870 and 1873; and (4.) there must be such evidence before the committing magistrate as would warrant him in sending the case for trial, if it were an ordinary case in this country.

Is, then, the crime of such falsification a crime within the treaty? In my opinion it is. I take first the English version. The 18th head of art. 3 of the treaty (English version) runs: "Fraud by a bailee, banker, agent, factor, trustee, or director, or member or public officer of any company made criminal by any Act for the time being in force." At the time the treaty was signed, and at the time it was ratified, the Larceny Act, 1861 (24 & 25 Vict. c. 96), was in force. By s. 83 it is provided

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that "whosoever being a director, public officer, &c., or member of any public company, shall, with intent to defraud, mutilate or falsify any book, paper, writing, or valuable security belonging to the public company, or make or concur in the making of any false entry, or omit or concur in omitting any material particular in any book of account or other document, shall be guilty of a misdemeanour." That this was regarded by the Legislature as a serious crime is shewn by the punishment which may follow on conviction for it, namely, penal servitude for any term not exceeding seven years and not less than three years, or imprisonment not exceeding two years with or without hard labour, and with or without solitary confinement. Further, the Act passed in 1875 "to amend the law with reference to the falsification of accounts" was also in force. By s. 1 it is provided that if any clerk, &c., shall wilfully and with intent to defraud destroy, alter, mutilate, or falsify any book, paper, writing, valuable security or account which belongs to or is in the possession of his employer, &c., or shall wilfully and with intent to defraud make or concur in making any false entry, &c., the person offending shall be guilty of a misdemeanour and be liable to be kept in penal servitude for a term not exceeding seven years, or to be imprisoned with or without hard labour for any term not exceeding two years. It seems clear, therefore, that the falsification charged, if committed by a member, public officer, or director of a public company, or by a clerk or servant, is within the English version of the treaty. In other words, such a falsification is a crime against English law in respect of which the French Government has engaged (other conditions being fulfilled) to grant extradition.

I now turn to the French version of the treaty. The French version of the 18th head of art. 3 of the treaty is certainly not a translation of the English version, nor does it in substance cover the same ground. It deals with the fraudulent misappropriation by officers and members of a company of the funds of a company. It has no reference to falsification of accounts, pure and simple, by such officers and members. The English version, on the other hand, is, as we have seen, much wider, and, by its incorporation of the Acts of 1861 and 1875, includes

falsification of accounts in the manner charged against Arton. We must, therefore, look to see whether such falsification of accounts constitutes a crime under any other head of the treaty according to the French version. I turn to head 2 of art. 3 of the French version. That article both in the English and in the French version deals with forgery. As to the English version, it is clear that all falsifications of accounts do not constitute forgery; while it is equally clear that the falsification of accounts may take such a form as to amount to forgery at common law or under the Act of 1861 (24 & 25 Vict. c. 98) to consolidate and amend the statute law relating to forgery. But in the present case we must assume, as I have said, that the chief magistrate has come to the conclusion that there was no evidence before him in this case which warranted him in committing Arton for any such falsification of accounts as according to English law amounted to forgery; but that there was evidence before him of such falsification of accounts as amounted to forgery according to French law, and within the treaty. Was he warranted in that conclusion? I think he was.

The French version of the second head of art. 3 runs as follows: "Faux ou usage de pièces fausses; contrefaçon des sceaux de l'Etat, poinçons, timbres et marques publics, ou usage des dits sceaux, poinçons, timbres et marques publics contrefaits." There is no doubt, in my judgment, that the opening words mean forgery of or using false documents.

Turning to the Code Pénal, we find a number of articles dealing with various kinds of forgeries, as of money, of public seals, bank-notes, &c.; and then a group of articles relating to forgery of public and authentic writings and of writings of commerce or banking. Of this group art. 147 is one; it runs as follows: "Seront punies des travaux forcés à temps, toutes autres personnes qui auront commis un faux en écriture authentique et publique, ou en écriture de commerce ou de banque—soit par contrefaçon ou altération d'écritures ou de signatures—soit par fabrication de conventions, dispositions, obligations ou décharges, ou par leur insertion après coup dans ces actes—soit par addition ou altération de clauses, de déclarations ou de faits que ces actes avaient pour objet de recevoir et de constater."

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Does that article cover and include the crime of falsification of accounts according to English law? I think it clearly does. If so, it is an extradition crime according to and within both versions of the treaty. In the English version it comes under the 18th head of art. 3; in the French version it comes under the 2nd head of the same article. It is to be noted that in the "Extrait des procédures déposées au greffe de la Cour d'Appel de Paris" amongst the crimes imputed to Arton is (following the words of art. 147 of the Code Pénal) "le crime de faux en écritures de commerce." Further, French law being a question of fact to be determined as such in our courts, we are furnished with an affidavit from an expert in French law, M. Gabriel Astoul, a French advocate, which, after setting forth a translation of art. 147, proceeds as follows: "I am most clearly of opinion that falsification of accounts, under the circumstances referred to in the depositions used at Bow Street Police Court on the application for the surrender of Emile Arton, constitutes the offence of 'faux' mentioned in the treaty between Great Britain and France, and set out in art. 147 of the French Penal Code." The affidavit further explains that "the word 'other' in the said article means 'persons other than those referred to in art. 146,' viz., public functionaries or public officers." It seems, therefore, clear that the falsification of accounts, of which the chief magistrate has decided there was sufficient evidence, is a crime against the law of France and within the French version of the treaty. In other words, that such falsification of accounts is a crime in respect of which the Government of this country has solemnly engaged (other conditions being fulfilled) to grant extradition.

Further, it is clear that the crime in question, whether regarded as forgery or as falsification of accounts, is an extradition crime within the meaning of the Extradition Acts, 1870 and 1873. The learned law officers of the Crown, for some reason which I failed to appreciate, seemed unwilling to admit that "faux" in art. 147 means forgery. For my part it seems to me to be clear that it means that and nothing else, and it is to be observed that M. Gabriel Astoul does not suggest in his affidavit that it has any other meaning.

The matter then stands thus: Evidence of the crime of falsification of accounts according to English law not amounting to forgery according to that law and within the 18th head of art. 3 of the treaty (English version); evidence, also, that that crime of falsification is a crime according to French law, ranging itself, according to that law, under the head of forgery, and within head 2 of art. 3 of the treaty (French version). Why, then, is it not to be regarded as an extradition crime? I see no valid reason. English law, as I have said, treats some acts of falsification of accounts as forgery, but does not treat all of them as such. The French law, on the other hand (as we must conclude, on the evidence of fact before us), treats such falsification of accounts as alleged in this case as forgery within art. 147 of the Code Pénal. Is extradition to be refused in respect of acts covered by the treaty, and gravely criminal according to the law of both countries, because in the particular case the falsification of accounts is not forgery according to English law, but falls under that head according to French law? I think not. To decide so would be to hinder the working and narrow the operation of most salutary international arrangements.

It seems to me, therefore, that all the conditions which I have mentioned have in this case been fulfilled. In my judgment these treaties ought to receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent. I know no head of the French law for which an exact equivalent is to be found in the law of England.

The English and French texts of the treaty are not translations of one another. They are different versions, but versions which, on the whole, are in substantial agreement. We are here dealing with a crime alleged to have been committed against the law of France; and if we find, as I hold that we do, that such a crime is a crime against the law of both countries, and is, in substance, to be found in each version of the treaty, although under different heads, we are bound to give effect to the claim for extradition.

I think I have correctly stated the view of the facts taken by

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the learned chief magistrate. We are not a Court of Appeal on questions of fact from him. We have only to see that he had such evidence before him as gave him authority and jurisdiction to commit. But lest there should be any misapprehension, I think it well that the view of the Court should be presented to him and that the order of committal should be remitted to him in order that it may be made clear in respect of what crime of "faux" Arton is committed. The first offence should, I think, be described as "the crime of fraudulent falsification of accounts as a director, officer, or member of a public company according to the law of England, and constituting the crime of 'faux en écritures de commerce' within art. 147 of the French Code Pénal."

The rule will therefore be discharged.

Solicitor for the Crown: *Solicitor to the Treasury.*
Solicitors for defendant: *Arthur Newton & Co.*

W. J. B.

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Feb. 22.

Licensing Acts—Offences—Sale at Place not authorized by Licence—Sale—Appropriation of Goods Sold—Licensing Act, 1872 (35 & 36 *Vict.* c. 94), *s.* 3.

A brewer at Burnley, having an off-licence for the sale of beer by retail, sent round a traveller to obtain orders at Accrington. The traveller handed to the customer at whose house he called a printed and stamped post-card, addressed to the brewery; the traveller wrote on the post-card the quantity of ale required, and the customer signed the post-card, which was then posted by the traveller. The post-card contained a request to the brewer to supply the quantity of ale named weekly until further notice, and concluded as follows: "I assent to the appropriation by you to this order at your brewery of goods of the above description and in a deliverable state." The brewer's carter selected at the brewery, in accordance with such an order, six bottles of ale, one of which he labelled with the customer's name and address, and placed them in a coop or box together with six other bottles for another customer, one of which was also labelled. The goods (with others) were then placed on a lorry, and ultimately delivered at the customer's house, where they were paid for on delivery:—

Held, that there had been a complete sale and appropriation of the goods at the brewery at Burnley, and that the brewer could not be convicted under s. 3 of the Licensing Act, 1872, of selling intoxicating liquor at a place where he was not authorized by his licence to sell the same.

Pletts v. *Campbell* ([1895] 2 Q. B. 229) distinguished.

Case stated by justices for the borough of Accrington.

An information had been preferred by James Beattie, the respondent, against Jonathan Pletts, the appellant, under s. 3 of the Licensing Act, 1872, charging that he on September 7 1895, being a beer seller and duly licensed to sell by retail certain intoxicating liquors in his house and premises, No. 11, Stanley Street, Burnley, unlawfully did sell certain intoxicating liquor at No. 44, Higher Antley Street, Accrington, where he was not then authorized by his licence to sell the same. Upon the hearing of the information the following facts appeared.

The appellant, a brewer, held a licence pursuant to 11 Geo. 4, and 1 Will. 4, c. 64, and the Acts amending the same for the sale of beer by retail at 11, Stanley Street, Burnley, to be consumed off the premises; he was not licensed for the sale of beer at Accrington. Previously to June 21, 1895, one Nelson,

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of 44, Higher Antley Street, Accrington, had purchased ales of the appellant, and on that date one Ramsbottom, a traveller of the appellant, called upon Nelson for an order and brought with him on behalf of the appellant a printed and stamped post-card addressed to the appellant at 11, Stanley Street, Burnley; this card he read to Nelson, and told him it was necessary he should sign it, and that it must be transmitted to appellant before the order could be accepted, and that if the appellant appropriated the goods to the contract, he (Nelson) must take them. Ramsbottom then wrote on the card opposite "Dinner Ale" the words "6 Pts."; Nelson signed it and handed it to Ramsbottom, who put it in the post at Accrington. The following is a copy of the material portion of the back of the card:—

"44, H. A. St., Accrington.
"June 21, 1895.

"Dear Sir,—Please supply me weekly as under until further notice

* * * * * * *

"I assent to the appropriation by you to this order at your brewery of goods of the above description and in a deliverable state.

"Yours truly,
"Walter C. Nelson."

On the front of the post-card were printed the words, "Mr. J. Pletts, 11, Stanley Street, Burnley."

Post-cards similar to the above were printed and stamped by and at the expense of the appellant, and were handed by him to Ramsbottom to get signed by customers and to see that they were posted.

Between June 21 and September 7 the same quantity of ale had been delivered to Nelson on Saturday in each week in pursuance of the order in the post-card; but Ramsbottom had occasionally called on Nelson the day before the weekly delivery to see if there was any change in the order, and had so called on September 6, when Ramsbottom told him there was no change.

On September 7 (the day named in the information) Rams-

bottom delivered six pint bottles of dinner ale at Nelson's house from a lorry, for which Nelson there paid Ramsbottom 1*s.* 3*d.* There was a number of coops or boxes containing bottles of ale on the lorry for other customers, and Ramsbottom took one of the coops or boxes containing six bottles of ale, one of which was labelled, "Mr. Nelson, Higher Antley Street, 6 pints of ale," off the lorry and into Nelson's house, and delivered the bottles from it, after having delivered others at other houses in the same manner. When the lorry left Burnley this coop or box also contained six bottles of ale and stout for another customer; but these had been delivered before arriving at Nelson's. The bottle with the label was near to the other five bottles in the box, but none of the five, nor the coop or box, were labelled or addressed. On the morning of the day Ramsbottom was at the appellant's brewery at Burnley, and filled up his lorry with goods in execution of orders from Accrington, amongst which were six bottles of dinner ale for Nelson, one of which was then and there labelled as before stated and placed in the coop or box; and there were also in the same coop or box the six other bottles for the other customer, one of which was also labelled for him. The bottles of liquors placed on the lorry were made up from a list made out by Ramsbottom, and only liquors in accordance with such list were placed on the lorry; but the list contained the quantities only, and not the names of customers to whom the liquors had to be delivered; but Ramsbottom had a book which he carried with him containing the names and addresses of the customers.

It was contended for the appellant that the bottles of ale were delivered in pursuance of the order given in the post-card of June 21; that there was no contract until the post-card was delivered by post at Burnley and accepted by the appellant; that the bottles of ale had been appropriated and set apart by the appellant at Burnley, and that such appropriation had been assented to by Nelson by the foot-note to the post-card, and that the sale, therefore, took place at Burnley, and not at Accrington.

It was contended for the respondent that all the material elements of a sale took place at Nelson's house at Accrington;

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that the order given in the post-card was given at Accrington, it having been delivered to his servant Ramsbottom at that place; that the goods were delivered and paid for at Accrington; that the fact that Ramsbottom called on September 6 to see if there was any change in the order shewed that there was a new order on that date, and that the post-card was not relied upon by the appellant as a continuous order until countermanded.

The justices were of opinion that the sale of the ale, within the meaning of s. 3 of the Licensing Act, 1872, took place at Accrington, and not on the appellant's licensed premises at Burnley. They therefore convicted the appellant, and inflicted a fine of 5*l*.

The question for the Court was whether the justices came to a correct determination in point of law.

Lawson Walton, Q.C. (*W. Mackenzie* with him), for the appellant. The sale was at Burnley, for the contract was made and the goods were appropriated at that place, and not at Accrington. The post-card was not a contract by itself; it was merely an offer, which had to be, and was, accepted at Burnley. From the facts found by the justices a sufficient appropriation of the five bottles may be inferred, and the case is, therefore, distinguishable from *Pletts* v. *Campbell*. (1)

Bigham, Q.C. (*W. B. Ferguson* with him), for the respondent. The decision of the justices was right. The sale was at Accrington. There was no definite contract of sale until delivery of the goods at Accrington, delivery being a condition precedent to the obligation to pay. A sale involves the creation of a debt; but there was here no debt until the goods were delivered. *Taylor* v. *Jones* (2) is an authority that the whole cause of action for the price of the goods arises in the place where the order is given and the goods are delivered.

[WRIGHT J. In that case there had been no effective appropriation of the goods before delivery.]

There was no sufficient appropriation of the five bottles in the present case; there was nothing to prevent the carter taking them back and substituting others in their place.

(1) [1895] 2 Q. B. 229. (2) 1 C. P. D. 87.

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Walton, Q.C., in reply. The sale was complete without delivery. In a contract of sale the property may pass by the contract, although the buyer may bargain for delivery and the price may not be payable until delivery. The appropriation was complete; it is clear that the carter put the bottles in the coop for Nelson, and, knowing that he had so appropriated them, delivered them to him. [He cited *Tregelles* v. *Sewell* (1); *Bennett* v. *Cosgriff*. (2)]

DAY J. I am of opinion that this conviction should be quashed. In my judgment there was a complete sale at Burnley, and an appropriation of the goods there. Nothing was left but to deliver and pay for the goods, which was done in due course.

WILLS J. I am of the same opinion. I think that it is clear that although the delivery of the beer was to be at Accrington, the sale was at Burnley. Sale and delivery are two distinct elements in a contract for the sale of goods. An action may be brought in respect of goods bargained and sold, or in respect of goods sold and delivered; but an action to recover the price of "goods sold" was never heard of, and a declaration for "goods sold" would have been demurrable, and such a claim would still be bad in law in the absence of circumstances to shew either that the bargain made was that the sale should be complete without delivery, or else that there had in fact been a delivery as well as a sale. A "sale" may be something incomplete in itself, and the expression "sale" may be satisfied although the actual delivery of the goods still remains to be carried out. The provisions of the Licensing Act were not framed with a regard to the niceties which sometimes enter into the consideration of a contract for goods sold and delivered; those provisions are satisfied if the substantial elements of a sale take place on the licensed premises, though the beer is consumed or delivered off them, and it would be a strong thing to say that there had been a breach of the law if the vendor, holding a licence to sell beer for consumption off the premises,

(1) 7 H. & N. 574. (2) 38 L. T. 177.

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undertook the delivery of the beer sold. I see nothing that requires us to put such a construction upon the statute. I think in the present case that the sale on the premises was complete, although the delivery remained to be performed.

Then, as to the appropriation, I think that what is stated in the case does amount to a statement that the bottles in the case had been appropriated to their respective purchasers; that is the only difficulty I have felt in the case. I do not doubt that the justices intended loyally to follow our previous decision in *Pletts* v. *Campbell* (1); and it is, therefore, difficult to understand their present decision, unless they meant to say that the bottles had not been completely appropriated and earmarked. I think, however, that what was done by Ramsbottom when he selected the six bottles for Nelson and put them in the case amounted to an appropriation of them, and that the case, as stated, presents no difficulty on that point.

WRIGHT J. I agree. It seems to me as though the justices meant to say that the fact of the order being taken at the customer's door prevented the sale being a sale at the licensed premises. I think, however, that enough has been done to satisfy the language of the statute, which is not to be construed with excessive legal nicety as to what constitutes a sale.

Conviction quashed.

Solicitor for appellant: *Kirkman, for Garnett & Jackson, Burnley.*

Solicitor for respondent: *Kirkman, for Haworth & Broughton, Accrington.*

(1) [1895] 2 Q. B. 229.

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.
1896
March 4.

HENDERSON BROTHERS *v.* SHANKLAND & CO.

Ship—General Average—Adjustment—Constructive Total Loss.

Where, a ship having sustained damage in a storm, it then became necessary, for the purpose of saving the ship and cargo, to make a general average sacrifice, the result of which was that the ship became a constructive total loss and was sold as such:—

Held, that the proper mode of ascertaining the amount of the shipowners' loss by the general average sacrifice was by taking the difference between the value of the ship undamaged and the estimated cost of repairing the particular average damage and deducting therefrom the proceeds of the sale of the ship; and that no deduction of one-third new for old was to be made from the estimated cost of the repairs.

APPEAL from the judgment of Mathew J. at the trial before him without a jury.

The action was brought for an order of the Court directing the defendants to concur in the necessary steps for the repayment to the plaintiffs of a sum of money paid by the plaintiffs into a bank in the joint names of the plaintiffs and defendants to secure the amount for which the plaintiffs might be liable on a general average adjustment. The question raised in the action was as to the amount to which the plaintiffs as owners of cargo were liable to contribute in respect of a loss sustained by the defendants as shipowners through a general average sacrifice. The facts were as follows. The ship sailed from Chittagong for Dundee with a cargo of jute belonging to the plaintiffs. On the voyage she encountered a storm, in which she sustained certain damage. The storm continuing and the ship being then on her beam ends, in order to right her the mainmast and foremast were cut away. She was subsequently towed into Calcutta. She was there surveyed, and, it having been ascertained that the cost of repairing her would exceed her value when repaired, she was condemned and sold as a constructive total loss. A general average statement was prepared on the defendants' behalf by average adjusters in the following manner. They estimated the cost of repairing the particular

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average damage sustained by the ship before the general average sacrifice at 3429*l.*, and the cost of repairing the general average damage at 5797*l.*, making together a total of 9226*l.* The relative proportions which the estimated cost of repairing the particular average damage and the estimated cost of repairing the general average damage respectively bore to the total estimated cost of both being thus respectively 37 per cent. and 63 per cent., they divided the total loss of the shipowners between general and particular average as follows. The value of the ship before she was damaged was 6000*l.* Deducting from that amount the nett proceeds of her sale at Calcutta, which they fixed at 166*l.*, they brought out the shipowners' total loss as 5834*l.*, of which 63 per cent. was 3675*l.*, and that amount they treated as the amount to be contributed to in general average. Average adjusters employed by the plaintiffs proceeded on the following principle. They deducted the estimated cost of repairing the particular average damage, 3429*l.*, from 6000*l.*, the value of the ship undamaged, and treated the balance, 2571*l.*, as the value of the ship at the time of the general average sacrifice. Deducting from that amount the nett proceeds of the sale of the ship at Calcutta, which they fixed at 883*l.* (1), they brought out the amount to be contributed to in general average as 1688*l.* It was contended in the Court below by the defendants that, if the adjustment were to be made according to the principle adopted by the plaintiffs, a deduction of one-third new for old ought to be made from the estimated cost of repairing the particular average damage.

The learned judge decided that the mode of adjustment contended for by the plaintiffs was the right one, and that the deduction contended for ought not to be made; and the case was referred back to the average adjusters in order that they might make a fresh adjustment on that basis.

Bigham, Q.C., and *Leck*, for the defendants. The principle of adjustment contended for by the defendants is the correct

(1) The difference between the plaintiffs' and defendants' average adjusters as to the amount of the nett proceeds of the sale arose from a difference between them as to the expenses which ought to be allowed as deductions from the gross proceeds.

one. There was here one loss, the conjoint result of the two sorts of damage arising in the same storm. The proper mode of apportioning that loss between general and particular average is to do so according to the proportion which the estimated cost of repairing each kind of damage respectively bore to the total estimated cost of repairing both. At any rate, the principle contended for by the plaintiffs is fallacious. It may be, as they contend, that the value of the ship must be taken as she existed after the particular average damage and before the general average sacrifice, but it is a fallacy to say that the cost of repairing the particular average damage is necessarily the measure of the depreciation of her value. According to the plaintiffs' contention, if the cost of repairing the particular average damage amounted in a case like this to more than the value of the ship undamaged, there could not afterwards be any general average sacrifice to contribute to, because the shipowners would have nothing at risk and therefore could not sacrifice anything. That is obviously wrong, because it is in fact possible that in such a case there may be a further damage incurred by the shipowners in order to bring the ship and her cargo safely to port, by which the saleable value of the ship as a constructive total loss would be diminished. The plaintiffs, in applying the principle for which they contend, ought to make an allowance of one-third new for old upon the estimated cost of repairing the particular average damage. If the ship were in fact repaired, she would be worth more than she was before the particular average damage occurred.

Scrutton (*Joseph Walton, Q.C.*, with him), for the plaintiffs. The question is, what did the shipowners lose by the general average sacrifice? It is obvious that the principle applied by the defendants' average adjusters is wrong, and that the value of the ship as diminished by the particular average damage previously to the general average sacrifice must be taken as the basis of the adjustment, not her value before the particular average damage occurred. See per Brett L.J. in *Shepherd* v. *Kottgen*. (1) The only practical mode of ascertaining the value of the ship at the time of the general average sacrifice is by

(1) 2 C. P. D. 578, at p. 590.

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deducting the estimated cost of repairing the particular average damage from her value before the damage occurred: Arnould on Marine Insurance, 6th ed. p. 904; Lowndes on General Average, 3rd ed. p. 190; 4th ed. p. 303. With regard to the second point, the deduction of one-third new for old is never made except where repairs are actually done. According to the authorities, such a deduction is not to be made in estimating whether there has been a constructive total loss: Arnould on Marine Insurance, 6th ed. pp. 940, 1048; Phillips on Insurance, 5th ed. vol. 2, p. 267, s. 1543.

Leck, in reply.

LORD ESHER M.R. In this case the plaintiffs are cargo-owners and the defendants are shipowners. There has been a general average sacrifice, and the question is how this case is to be dealt with for the purpose of determining the amount to which the parties are respectively liable to contribute in respect of that sacrifice. Without going into the figures, with which we are not called upon to deal, the facts of the case were these. The ship started on her voyage, being at that time of a certain value. During the voyage a severe storm came on, in which the ship suffered considerable damage. The storm continuing, it became probable that both ship and cargo would be lost, unless something was done. Thereupon the general average sacrifice was made in respect of which the plaintiffs and defendants respectively have to contribute. The learned judge in the Court below was asked to lay down the proper rule for adjusting the contributions which they had to make. The main question in the case appears to be how the value of the ship is for this purpose to be ascertained. Is the value to be taken that of the ship at the time when she started on the voyage, or, as afterwards suggested, at the commencement of the storm which occasioned the two effects, namely, the particular average damage and the general average damage, or is it to be the value at the moment before it became necessary to make the general average sacrifice? It is obviously impossible to say that the value of the ship at the commencement of the voyage is to be taken. The ship might since the commencement of the voyage have

encountered several storms and incurred particular average damage in each, and have put into several ports of distress to have such damage repaired. Nor can it be that the value to be taken is that of the ship at the commencement of the storm by which both the damages, the particular average damage and subsequently the general average damage, were occasioned; for according to that contention it would make a great difference whether the two kinds of damage arose in the same storm, or one arose in one storm and the other in another storm six hours later, which would be absurd. It appears to me quite obvious that for the purpose of making the average adjustment the value of the ship just before the general average sacrifice took place must be taken. The learned judge below has so decided. Then comes the question, how that value is to be ascertained. Theoretically, what is to be ascertained is the value of the ship at that time. How is that practically to be done? When the ship arrives in port repairs may be effected, but, if the ship is not repaired, as was the case here, the cost of repairing her may be estimated by skilled persons. What is the mode of arriving at the value of the ship which has been adopted by the general practice in England? The estimated cost of repairs cannot, in strict theory, give the value of the ship at the time in question. The only other way, however, by which that value could be ascertained would be by the opinions of expert witnesses, who would probably all differ. Under these circumstances a practical working rule appears to have been established in this country by general mercantile practice, which is, that the value of the ship is to be ascertained by taking the difference between the value of the ship when undamaged and the estimated cost of repairing the particular average damage. That appears to me to be the result of the rule which is laid down by Lowndes on General Average, 3rd ed. p. 190; 4th ed. p. 303, as applicable to a case of this kind, and that is in effect what the learned judge below held when he said, "The ship sustained a loss by perils of the sea which is capable of being approximately ascertained by making an estimate of the cost of repairs." So far the judgment appears to me to be correct. But then it was contended that a deduction of one-

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third, new for old, should be made from the cost of those repairs in ascertaining the value of the ship. The learned judge below held that such a deduction ought not to be made. The rule with regard to that deduction and the reason for it are clearly shewn by Phillips on Marine Insurance, 5th ed. vol. 2, p. 297, s. 1543. It appears from what he says that the reason for this deduction is the benefit obtained from repairs. Here no one got any benefit from repairs, for none were executed. I think the learned judge was right in saying that this deduction is never made except where repairs are done. Then there is the passage in Arnould on Marine Insurance, 6th ed. p. 1048, where the author takes the view that this deduction is not applicable to cases of constructive total loss, in which he is fortified by the opinion of Story J., an authority who is held in high estimation in this country; and this view is adopted in the passage I have referred to in Phillips on Insurance, which is also a work of high value. The authorities appear to me to justify the learned judge below in saying that the deduction contended for ought not to be made. For these reasons I think his judgment was right and must be affirmed. It does not deal with the figures, but leaves them to be ascertained on the principles which it lays down. Therefore the case must go again before the average adjusters in order that the figures may be worked out in accordance with our judgment.

LOPES L.J. I propose merely to deal with the principles laid down by the judgment of the learned judge in the Court below, apart from the figures. I agree with the principles so laid down. Putting the matter in popular language, the question is what the shipowners lost by the general average sacrifice in this case. To determine that, it is necessary to see what they had at risk at the time when it was made. What they then had at risk could, as it appears to me, only be the value of the ship as it existed at that time. The ship having been previously damaged by perils of the sea and a particular average loss having occurred, her value when the general average sacrifice was made would be her value as depreciated by the particular average damage. That value in practice can

only be arrived at approximately by deducting from her value as she existed before that damage occurred what it would cost to repair it. Deducting from the value so ascertained the amount for which the ship was sold at Calcutta, we get the amount of the general average loss. That is the principle which appears to have been laid down by the learned judge and which in my opinion is correct. Then it was argued that in ascertaining the value of the ship an allowance of one-third new for old ought to be made. I cannot assent to that proposition. It appears from what is laid down both in Arnould and Phillips on Marine Insurance that in a case like this no such allowance ought to be made. The ship was a constructive total loss, and no repairs were ever effected. That being so, there was no improvement of her by repairs. Therefore I do not think the suggested deduction ought to be made. I agree that the appeal should be dismissed.

RIGBY L.J. I am of the same opinion. With regard to the general principle it is unnecessary to say more than that, in dealing with a question of this sort, it seems obvious that the value of the ship at the time when the general average sacrifice took place must be regarded. The difficulty which I felt during the argument was as to the mode in which in a case like this that value is to be ascertained. It appears impossible to ascertain it exactly; it must be estimated in a more or less uncertain manner. The view adopted by the learned judge in the Court below was that practically it could only be estimated approximately, and that that was to be done by estimating the cost of the repairs necessary to restore the ship to the condition in which she existed before the particular average damage and deducting that amount from her value in that condition. It was argued by the counsel for the defendants that the rule so laid down would not do absolute justice in all cases. By suggesting extreme instances they sought to shew that this rule might work injustice in a case where the estimated cost of repairing the particular average damage would swallow up the total value of the ship as a ship and make her a constructive total loss, and yet a general average sacrifice might still take place which

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Rigby L.J.

would affect the value of the materials of which she was composed for sale on arrival in port. I do not think that such a consideration as that is a reason for departing from a general rule which appears to be practically the most convenient that can be adopted for dealing with cases of this kind. It usually happens that a general rule fails in extreme cases, and it would be easy to shew that the alternative suggested by the defendants of deducting one-third would lead in extreme cases to injustice, to say the least, as great. Unless some general rule were adopted, it would be necessary to call experts in each case to estimate speculatively the value of the ship as she existed after the particular average damage and before the general average sacrifice. With regard to the question of the deduction of one-third new for old, the same rule has been applied in this case as appears to be applicable in estimating whether there has been a constructive total loss of a ship. It appears to me that the rule so applied by the learned judge below in dealing with this case is on the whole the most convenient general rule to lay down, and, though the point involved does not seem to have been ever actually determined, his view appears to be supported by the analogy of decided cases.

Appeal dismissed.

Solicitors for plaintiffs: *Waltons, Johnson, Bubb & Whatton.*
Solicitors for defendants: *Lowless & Co.*

E. L.

VESTRY OF ST. LEONARD, SHOREDITCH, APPELLANTS; PHELAN, RESPONDENT.

1896
March 18.

Metropolis—Management—"Drain"—"Sewer"—Combined Drainage—Metropolis Local Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 68, 250.

A pipe carrying the sewage of two houses in a metropolitan parish into the main sewer was vested in and repairable by the vestry under the Metropolis Local Management Act, 1855, being a "sewer" within the definition of that word in s. 250. Subsequently the owner of one of the houses disconnected his sewage, so that thereafter the pipe was "used for the drainage of one building only" within the definition of "drain" in the same section:—

Held, that the pipe did not, upon such disconnection taking place, become a drain repairable by the owner of the house still served by it, but remained a sewer vested in and repairable by the vestry.

CASE stated by a metropolitan police magistrate under the Summary Jurisdiction Acts.

The respondent was summoned before the magistrate to answer a complaint, made by a sanitary inspector on behalf of the appellants, that a nuisance existed at the respondent's house, No. 42, Westmoreland Place, Shoreditch, by reason of a defective drain, and the appellants asked for an order requiring the respondent, as owner of the premises, to reconstruct the drain.

The following facts appeared in evidence. In the rear of No. 42, Westmoreland Place was situate a house, No. 36, Nile Street, contiguous to the back wall of the yard belonging to No. 42, Westmoreland Place. The premises were not within the same curtilage. The alleged "drain" mentioned in the summons was a pipe which, prior to April, 1895, after taking the sewage from the water-closet of No. 42, Westmoreland Place, passed under part of the premises of No. 36, Nile Street; took the sewage from the water-closet of that house, and, after again passing through the respondent's premises, emptied into the main sewer under the roadway of Westmoreland Place. The pipe did not carry the drainage of any other house except No. 36, Nile Street, and No. 42, Westmoreland Place. It was not

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proved at what date the houses or water-closets or the combined drainage were made or constructed, but they were proved to be ancient. It was not proved that the combined drainage was made under the order of the appellant vestry, or pursuant to the order or direction or with the sanction or approval of the Metropolitan Commissioners of Sewers.

In April, 1895, the owner of No. 36, Nile Street, removed the water-closet of that house, and constructed another water-closet in a yard in the rear of another house which also belonged to him, and connected that water-closet with the drainage of that house. As soon as this work was completed the pipe draining the water-closet of No. 42, Westmoreland Place was a pipe only draining that one house instead of two houses as formerly. It was proved that the owner of No. 36, Nile Street had made the alteration at the instance of the sanitary inspector of the appellants, and pursuant to a notice in writing purporting to be under s. 3 of the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), but without being compelled to do so by legal proceedings. This notice was served upon the owner of No. 36, Nile Street, after a notice, on a similar form, had been served on the respondent with reference to the part of the pipe upon his premises, in answer to which the respondent had alleged the pipe to be a sewer. On May 10, 1895, a notice under s. 4 of the Public Health (London) Act, 1891, was served on the respondent, as owner of No. 42, Westmoreland Place, by the appellants, stating that a nuisance liable to be dealt with summarily under the Act was existing at those premises by reason of a defective drain, and requiring the respondent, within seven days from the service of the notice, to alter or amend the drain as might be found necessary, and fit the same with the proper pipes, traps, and bends, and junctions to secure safe working, and the notice stated that, if default were made in complying with the requisitions thereof, a summons would be issued for the purpose of enforcing the abatement of the nuisance complained of. The requisitions of the notice were not complied with, and subsequently the summons was issued.

The magistrate decided that, having regard to the provisions of the Metropolis Local Managements Acts, 1855 (18 & 19 Vict.

c. 120) and 1862 (25 & 26 Vict. c. 102), the alleged drain was a sewer, and he held, therefore, that it was vested in and repairable by the appellants, and refused to make any order requiring the respondent to alter or amend it.

The question for the opinion of the Court was whether, upon the facts proved, the magistrate "ought as a matter of law to have found the pipe to be a drain within the meaning of s. 250 of the Metropolis Local Management Act, 1855." (1)

Lawson Walton, Q.C. (*C. E. Allan* with him), for the appellants. The magistrate ought to have made the order asked for. When the first notice was served upon the respondent the pipe in question had become a "drain" within the definition in s. 250 of the Metropolis Local Management Act, 1855, because it was "used for the drainage of one building only." The magistrate must decide having regard to the existing state of things; he is not bound and ought not to inquire into the previous history of drains. The notices given to the respondent were given under ss. 3 and 4 of the Public Health (London) Act, 1891. (2)

(1) By the Metropolis Local Management Act, 1855 (18 & 19 Vict. c. 120), s. 250, "the word 'drain' shall mean and include any drain of and used for the drainage of one building only, or premises within the same curtilage, and made merely for the purpose of communicating with a cesspool or other like receptacle for drainage, or with a sewer into which the drainage of two or more buildings or premises occupied by different persons is conveyed, and shall also include any drain for draining any group or block of houses by a combined operation, under the order of any vestry or district board; and the word 'sewer' shall mean and include sewers and drains of every description, except drains to which the word 'drain,' interpreted as aforesaid, applies."

By the Metropolis Local Management Acts Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 112, the word "drain" shall be deemed to apply to and include the subject-matters specified in s. 250 of the Act of 1855, "and also any drain for draining a group or block of houses by a combined operation, laid or constructed before the first day of January, 1856, pursuant to the order or direction or with the sanction or approval of the Metropolitan Commissioners of Sewers."

(2) The Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 3: "Information of a nuisance liable to be dealt with summarily under this Act in the district of a sanitary authority may be given to that authority by any person, and it shall be the duty of every officer of that authority and of every relieving officer, in accordance with the regulations of the authority having control over him, to give that information; and it shall be the duty of the said authority to make

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Those notices are the foundation of the proceedings before the magistrate. At the time they were given there was a nuisance on the respondent's premises, which "continued by his default," and the magistrate ought not to have gone into any other facts. Next, there was no evidence before the magistrate of the circumstances under which No. 42, Westmoreland Place, and No. 36, Nile Street came to be drained by a combined operation, and he ought to have presumed that the Metropolitan Commissioners of Sewers had sanctioned the combined operation under s. 112 of the Metropolis Local Management Acts Amendment Act, 1862, and to have found that the pipe was a drain and had never been a sewer. It is not necessary for the vestry to expressly prove the sanction. The maxim "Omnia præsumuntur rite esse acta" applies.

Rowlatt, for the respondent. It is clear on the facts stated in the case that the pipe was a sewer before the owner of No. 36, Nile Street disconnected his sewage. Once a sewer always a sewer. By s. 68 of the Metropolis Management Act, 1855, every sewer made and to be made within the district shall be vested in the vestry; and by s. 69 they are bound to repair and maintain all sewers vested in them. They have power to enter premises in order to enlarge and repair a sewer, and they may compel neighbouring owners to drain into it. There is no provision enabling them by any means to divest themselves of sewers, and such a divesting cannot be effected except by statute. It would be a strange result if, by the acts of other persons in

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the said regulations, and also the duty of the sanitary authority to give such directions to their officers as will secure the existence of the nuisance being immediately brought to the notice of any person who may be required to abate it, and the officer shall do so by serving a written intimation."

Sect. 4: "(1.) On the receipt of any information respecting the existence of a nuisance liable to be dealt with summarily under this Act the sanitary authority shall, if satisfied of the existence of a nuisance, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or, if such person cannot be found, on the occupier or owner of the premises on which the nuisance arises, requiring him to abate the same within the time specified in the notice, and to execute such works and do such things as may be necessary for that purpose, and, if the sanitary authority think it desirable (but not otherwise) specifying any works to be executed."

disconnecting their sewage, a liability to repair what had formerly been a sewer repairable by the vestry should be cast upon the owner without his consent. It might involve his having an easement through the land of others, and a licence to enter for the purpose of repairing. The very object of vesting the sewers in sanitary authorities is to prevent, once for all, complicated questions arising as to the ownership of property and the right to break up the soil of another in order to repair, &c. See *Travis* v. *Uttley* (1), judgment of Wright J.

As to the second point taken on behalf of the appellants, no presumption arises that the Metropolitan Commissioners of Sewers ever sanctioned the combined system of drainage. The magistrate finds that the two houses and the combined drainage were ancient, and the Metropolitan Commissioners of Sewers were only constituted in 1848, by 11 & 12 Vict. c. 112.

Lawson Walton, Q.C., in reply. The statute intends the divesting to be effected mechanically by the operation of physical causes. The pipe here ceased to be vested in the vestry when the disconnection of the sewage of No. 36, Nile Street took place. There is no necessity for any express statutory provision for divesting. When a drain becomes a sewer through the drainage of other houses, or another house, being connected with it, it is the fact of the connection which causes it to become vested in the vestry. [He referred to *Kershaw* v. *Taylor*. (2)]

DAY J. I am of opinion that our judgment in this case should be for the respondent. I think that the magistrate was right in the conclusion at which he arrived. He was asked to hold that the pipe in question was a "drain" and not a "sewer." It appears clearly from the statements in the case that at one time this pipe took away the drainage of two houses. There is no evidence that this mode of drainage was ever sanctioned or approved by the Metropolitan Commissioners of Sewers, or by the vestry, as a "combined operation" under the Metropolis Local Management Acts, the effect of the legislation being that a pipe which takes the drainage of two or more

(1) [1894] 1 Q. B. 233, at p. 235. (2) [1895] 2 Q. B. 208.

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houses is to be deemed a sewer, unless it is for draining a group or block of houses by a combined operation, and has been laid or constructed before a specified date, with the sanction or approval of the Metropolitan Commissioners of Sewers. It is, therefore, clear that at one time this pipe was a sewer. It, therefore, became vested in the vestry, and upon them was cast the burden and duty of repairing it. That burden they did not take upon themselves, and that duty they did not discharge. They allowed the sewer vested in them, and while it was vested in them, to get out of repair, and to become in such a condition as to be a nuisance. Thereupon it occurred to them to get the nuisance abated at the cost of somebody else, and, having come to that conclusion, whilst the nuisance was still existing and flourishing, an arrangement was made—whether at their suggestion or not is immaterial—with the owner of No. 36, Nile Street, that he should dispose of his sewage in another way, and he accordingly cut off all connection with the pipe which up to then had taken the sewage of his house and of No. 42, Westmoreland Place. Thereupon the vestry say, "This pipe is no longer a sewer; it is now a drain; and, being a drain, the duty to repair it is the duty of the owner of No. 42, and he must now be summoned before the magistrate, and proceedings taken against him under the Act in order to compel him to abate the nuisance." Proceedings were taken, and application was made to the magistrate to make an order against the respondent. The magistrate refused, and this case comes before us on appeal from his refusal. It is plain that the nuisance which the owner of No. 42 is asked to abate was caused by the parish not having repaired the pipe when it was a sewer. In my judgment once a sewer—I do not say always a sewer—but certainly always a sewer so long as it is used for the purpose of conveying sewage. I say so because I find that the Act of Parliament provides that every sewer, whether existing at the time the Act was passed or constructed afterwards, is to become vested in the vestry of the parish, who are bound to maintain and repair it. There is no provision in the statutes for divesting sewers, or for relieving the vestry from their duty to maintain and repair. In the present case I think

that this sewer was vested in the vestry, and did not cease to be a sewer because the owner of No. 36, Nile Street, has found some other way of disposing of his sewage. For these reasons I am clearly of opinion that the magistrate's decision was right.

WILLS J. I am of the same opinion. I do not think it is possible, in this case, to give judgment by simply answering the question whether this pipe was a drain. In one sense no doubt it was, because at the time the summons was taken out it was used for the drainage of one house, and therefore came within the statutory definition of a drain; but the real question obviously is, was it a drain under such circumstances as to make the owner of No. 42, Westmoreland Place liable to proceedings under the sections, to which our attention has been called, of the Public Health (London) Act, 1891? The question is undoubtedly one of some difficulty. Sect. 68 of the Act of 1855 is, to my mind, the governing factor in the case. It provides in distinct terms that all sewers (with certain qualifying words which are not material here), made or to be made within the district, shall vest in the vestry of the parish. Consequently when this system of drainage, by which two houses are drained by the use of one common pipe, was made, the pipe and works necessary to constitute the system vested in the vestry, and so long as they are vested in and belong to the vestry it cannot, I think, be contended that the machinery of the Act can be put into force to make any other person liable to do the work which would naturally fall upon the owner of the sewer. I think that the pipe and works when vested in the vestry are vested once for all. I find no provision for revesting them in the owners of the land in case one house, or a sufficient number of houses, should be disconnected from the system so as to reduce the drainage to a condition in which it is used for one house only. I think some words in the statute are wanted in order to effect such an alteration of ownership. It was said by counsel for the appellants that there is a mechanical change of ownership where the drainage of a fresh house is connected with and added to an existing drain. The answer is that there is express provision for the shifting of ownership when the

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drainage of one house is made to serve for two or more: but there is no analogous provision to meet the case where the use of a pipe has been contracted by cutting off other premises so as to bring the pipe within the definition of a drain. On all ordinary principles, it seems to me, some statutory provision is necessary in such a case to divest the property from the vestry and vest it in somebody else. There is no such provision, and I can well understand why there should be none. If the contention for the appellants were to succeed, anomalous and what might become serious and oppressive consequences might ensue. Without putting an extravagant case, suppose four houses making use of one drain only, and constructed originally to be served by that one drain. That drain is made very much larger than it would have been if it had been constructed to serve one house only. Suppose, further, that by operations to which the vestry must necessarily be consenting parties three of those houses have been cut off, and the remaining house is left, as the only means of draining it, with the old construction originally made for all the four houses. The result would be that the owner is left with a drain totally unsuitable for his purposes, because it is, I suppose, common knowledge that in a drainage system nothing is more dangerous than to have pipes which have to carry sewage too large for the flow of water which comes down them. I think it would be an unreasonable consequence that the owner should be saddled with a system of drainage which, although it was quite proper whilst there were four houses to be drained, was quite improper for one house only, remembering always that the changes which have brought the drain into such an unsuitable condition could not be effected without the consent of the vestry. I am of opinion, therefore, that this pipe, having become vested in the vestry as a sewer, remained so notwithstanding the change of condition which reduced it to serve one house instead of more.

It was argued for the appellants that the magistrate ought to have held the pipe to be a drain on another ground. He ought, it was said, to have found that the pipe never was a sewer, because there was a necessary presumption of law that the system by which these two houses were drained by one pipe had

been sanctioned by the Metropolitan Commissioners of Sewers. I cannot think that any such presumption arises under the existing circumstances. If there be a presumption, it is one of fact which the magistrate must consider along with the other matters of fact in the case. When one finds that the houses and system of drainage are described by the magistrate as "ancient," and that this legislation giving the commissioners power to sanction combined systems of drainage had its origin in the year 1848, it seems to me that the applicability of the presumption is absolutely negatived. I understand "ancient" to mean that the system has existed longer than anybody can tell, and that nobody knows when it was first put into operation. I think the finding that the premises are ancient distinctly negatives the notion that the system came into existence after the year 1848. If so, it came into existence at a time when the commissioners had no power either to give or to withhold their sanction to the combination, and it is impossible to say that the presumption can arise. I am of opinion, therefore, that the magistrate's decision was right.

Judgment for the respondent.

Solicitor for appellants: *H. Mansfield Robinson.*
Solicitors for respondents: *Powell & Skues.*

W. A.

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1896

March 23.

[IN THE COURT OF APPEAL.]

THE COMMITTEE OF LONDON CLEARING BANKERS *v.* THE COMMISSIONERS OF INLAND REVENUE.

Revenue—Stamp—Bill of Exchange—Order on Banker to transfer in account—Exemption—Bill drawn for the sole purpose of remitting Money to be placed to any Account of Public Revenue—Stamp Act, 1891 (54 & 55 *Vict.* c. 39), s. 32 (1), *First Schedule, tit.* "*Bill of Exchange*," *Exemption* 10.

A firm of bankers in London having an account at the Bank of England, for the purpose of enabling a customer to pay customs duties on goods otherwise than in cash, issued a document addressed to the cashiers of the Bank of England, and directing them to transfer from the account of the bankers to the account of the Commissioners of Customs a sum named therein. This document was dealt with in one of two ways: (1) it was handed by the bankers to their customer in exchange for his cheque for the same amount, and given by him to the Commissioners of Customs, who handed it to the Bank of England, or (2) it was handed direct by the bankers to a Customs officer in exchange for their customers' cheque and subsequently handed by the Commissioners of Customs to the Bank of England.

Held (affirming the decision of Wright and Kennedy JJ.), that the document was a bill of exchange payable on demand within the meaning of s. 32 of the Stamp Act, 1891, and that it was not exempt from duty as being a "bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue" within the meaning of the 10th exemption under the head "Bill of Exchange" in the First Schedule to the Act.

Sect. 32 is not to be construed as if the first part contained a definition of bills of exchange other than those payable on demand, and the second a definition of bills of exchange payable on demand; but the first part applies to bills of exchange generally, and any document mentioned in it must, if payable on demand, be treated as coming within the second part.

The primary object of the documents in question was to enable the merchant to obtain the release of his goods from the custom house, and they were therefore not drawn "for the sole purpose" of remitting money to an account of public revenue, and, moreover, having regard to the history of the exemption clause, the word "remit" only applied to the placing to its proper account money which was already public money.

THIS was an appeal by the Committee of London Clearing Bankers from the decision of a Divisional Court (Wright and

(1) The Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 32: "For the purposes of this Act the expression 'bill of exchange' includes draft, order, cheque, and letter of credit, and any document or writing (except a bank-

Kennedy JJ.) (1) that two documents addressed by a firm of bankers to the cashiers of the Bank of England, directing them to transfer from the account of the bankers to the account of the Commissioners of Customs the sums named therein—such sums being the amounts which the customers of the bankers had to pay for customs duties in order to clear their goods at the Custom-house—were bills of exchange payable on demand within the meaning of the Stamp Act, 1891, and were liable to the stamp duty of one penny. See the report below (1), where the facts are stated.

Cohen, Q.C., and *Tindal Atkinson*, for the appellants. This is not a bill of exchange payable on demand within the meaning of the Stamp Act, 1891. Sect. 48 of the Act of 1870 is in substance identical in terms with s. 32 of the present Act, and ever since the passing of the former Act these documents have been in use and have been accepted by the Commissioners without any suggestion ever having been made that they ought to be stamped. A taxing statute is to be construed strictly: *Partington* v. *Attorney-General* (2). [*Dixon* v. *Caledonian and Glasgow Ry. Co.* (3) was also referred to.] In *Buck* v. *Robson* (4) an instrument was held not to be an order for payment of money and so not a bill of exchange, though the payment of a sum of money could be obtained by means of it. This is not an

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note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money; and the expression 'bill of exchange payable on demand' includes (*a*) an order for the payment of any sum of money by a bill of exchange or promissory note, or for the delivery of any bill of exchange or promissory note in satisfaction of any sum of money, or for the payment of any sum of money out of any particular fund which may or may not be available, or upon any condition or contingency which may or may not be performed or happen; and (*b*) an order for the payment of any sum of money weekly, monthly, or at any other stated periods, and also an order for the payment by any person at any time after the date thereof of any sum of money and sent or delivered by the person making the same to the person by whom the payment is to be made, and not to the person to whom the payment is to be made, or to any person on his behalf."

(1) Ante, p. 222.

(2) L. R. 4 H. L. 100, at pp. 120, 122.

(3) 5 App. Cas. 820.

(4) 3 Q. B. D. 686.

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order for payment of money, but only a direction to transfer in account.

[KAY L.J. If A. owes money to B., and gives him an order on his bankers to transfer that amount from A.'s account to that of B., is not that an order for payment of money?]

No. The bankers could not pay the amount to B. He could only get the money by drawing a cheque upon them.

[KAY L.J. There is force in that; but is not this a document "entitling" the person in whose favour it is given "to draw"?]

No, for there is no certainty that a draft will be honoured. If A. gives an order on his bankers to transfer a certain sum from his account to that of B., the account of B. may be overdrawn to a larger amount, and in such a case, B. would not after the transfer be entitled to draw. Moreover, it would be a strange thing under any circumstances to say that a transfer which increases B.'s balance at his bankers entitles him to draw; he is entitled to draw because of the relation between banker and customer, not because his balance is increased. Again, s. 32 contains two definitions only, the second being a definition of a bill of exchange payable on demand, and the expressions in the former definition are not to be imported into the second. The second definition makes no reference to an instrument entitling a person to draw for a sum of money.

[KAY L.J. To what documents do you say that the expression about entitling to draw applies if not to such documents as these?]

A letter of credit is the best instance: *In re Agra and Masterman's Bank.* (1)

[KAY L.J. That was an authority to draw on themselves. Here the Act says to draw on another person.]

The Bank of England would be the other person. But supposing these documents to be bills of exchange payable on demand within the meaning of the Act, they come within the 10th exemption, for they are drawn up in order to remit money to the account of public revenue. It has been contended that in revenue statutes the word "remit" has a limited meaning, and

(1) 36 L. J. (Ch.) 222.

relates only to remitting what is already public money. The statutes hardly support this contention: 7 & 8 Geo. 4, c. 53, ss. 44–49; 4 & 5 Vict. c. 20, s. 15; 53 & 54 Vict. c. 21. Moreover, the plain meaning of a word in a statute cannot be altered by reference to its use in other statutes, and the ordinary meaning of "remit" is certainly not restricted in the way contended for. The word "sole" was much relied upon in the Court below; but remitting money to the account of the Commissioners of Customs is the sole purpose for which these documents were drawn. That the liability of the merchant for the duty is thereby discharged and his goods set free is an incident to the money being remitted.

[KAY L.J. It seems rather to be the principal object.]

The construction contended for by the other side requires the insertion into exemption 10 of some such words as are found in exemption 9.

Sir R. E. Webster, A.-G., and *Danckwerts*, for the Commissioners of Inland Revenue. The Court below did not call for any argument on the first part of the case, whether these documents were bills of exchange payable on demand. The appellants proceed on a wrong construction of the Act, and treat s. 32 as the charging section. That is not so. The charging section is s. 1, which refers to the schedule. The schedule imposes a duty of 1*d.* on bills payable on demand, and an ad valorem duty on other bills. "Bill of exchange" denotes a general class of documents, which may be divided into two—bills payable on demand and bills not so payable. The first part of s. 32 specifies documents in terms applicable to both divisions. It is not a defining section, but provides that, for the purposes of the Act, certain documents which are not bills of exchange at common law or under the Bills of Exchange Act, 1882, shall be deemed bills of exchange. The documents here in question come under several of the heads in s. 32: "A draft, order, cheque, and letter of credit." The only effect of sub-s. (*a*) is to extend the meaning of the words "payable on demand."

[They referred to *Thorne* v. *Smith* (1), and *British Linen Co.* v. *Caledonian Insurance Co.* (2)]

(1) 10 C. B. 659.

(2) 4 Macq. 107.

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Then as to the words "sole purpose" in exemption 10. Are these documents drawn solely for the purpose of remitting money to an account of public revenue? They certainly are not. The primary object is to get the merchant's goods released at the custom house. In the case of the first document the merchant receives the document, and the custom house officer, when it is delivered to him, allows the goods to be taken away. Much trouble is saved to the merchant, who escapes a tedious process. The primary purpose is to have a document with which to pay the custom house officer instead of paying him in cash, as he is not allowed to take a cheque. In the second case the custom house officer, in order to oblige the merchant, receives his cheque, and gets a transfer order from the bankers. The whole thing is done for the purpose of justifying the custom house officer in taking his hand off the goods. The documents are used by the merchant in order to get the goods released: 39 & 40 Vict. c. 36, ss. 55, 56.

The exemption 10 only applies to orders for passing over to the proper account moneys which are already public moneys. Exemptions 5, 6, 7, 8, 9 are all of that character, and if there were nothing else to support the view the right construction would be that "remit" has this limited meaning; but this construction is confirmed by the statutes 53 & 54 Vict. c. 8, s. 21; 53 & 54 Vict. c. 21, s. 15; 54 & 55 Vict. c. 24. In the collection of taxes there are local expenses which have to be paid, and provisions are made for the purpose of remitting the balance. The word "remit" has habitually been used in the limited sense in revenue statutes. According to the argument of the other side, if pushed to its legitimate extent, a cheque given in discharge of income tax or any other tax would not require a stamp.

These are bills drawn to take the place of cash for the purpose of getting the merchant's goods released.

Cohen, Q.C., in reply.

LINDLEY L.J. I do not think we should gain anything by taking further time to look into this case. After some little fluctuation of opinion I have come to the conclusion that the

decision of the Court below is right. We are dealing with the Stamp Act, 1891, which says that bills of exchange are to be stamped. It divides bills of exchange into two classes—bills of exchange which are to be stamped with a penny stamp, and bills of exchange which are to be stamped with an ad valorem stamp. The first are called bills of exchange payable on demand, and the second are other bills of exchange.

In order to apply the Act we must know what is here meant by the expression "bills of exchange," and we must know further what particular classes of documents falling within that description are to be deemed payable on demand, and liable only to a penny stamp. That is the problem to be solved. In order to solve it we must look to s. 32, which is the interpretation clause, and is divided into three sub-clauses. The first is general, and purports to answer the first question, What is a bill of exchange for the purposes of the Act? The second and third sub-clauses answer the other question, namely, What bills of exchange are to have the penny stamp?

The first part of s. 32 is as follows: "For the purposes of this Act the expression 'bill of exchange' includes draft, order, cheque, and letter of credit, and any document or writing (except a bank-note) entitling or purporting to entitle any person whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money."

It is obvious that these words include documents which would not be called bills of exchange in ordinary parlance, and would not be bills of exchange at common law or under the Bills of Exchange Act. All the documents mentioned are to be stamped. Then it is necessary to see which of them are to have a penny stamp. The Act says, "The expression 'bill of exchange payable on demand' includes" (or in other words the documents to bear a penny stamp include) certain documents mentioned in clauses (*a*) and (*b*), which I need not read.

Then we have to apply this construction (which I do not doubt to be the true construction of the Act) to the documents before us in this case. There are two documents identical in form, and the necessity for their use and the modes of using

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them are as follows. A merchant has some goods on which customs duties are payable. It is against the regulations of the customs to take cheques, and of course there is great risk in carrying cash for such payments, and merchants proceed in one or other of two ways. One way is for the merchant to give to the custom house officer a cheque and ask him to take it to the merchant's bankers and get for it the transfer order, which I will read presently. The custom house officer, when he has got the transfer order, is in a position to release the goods. He treats, and he is authorized to treat, that document as payment, although he is not authorized so to treat the cheque, and he releases the goods to the merchant, who thus gets his goods without any cash actually passing. The other way of doing it is this. The merchant takes a cheque to his bankers and asks them, instead of giving him cash for the cheque, to give him a transfer order. Having got that, the merchant or his clerk goes to the custom house officer and delivers it to him, and then gets the goods. That is what these orders are. They are on a form issued by the Bank of England to bankers, which is as follows: "To the cashiers of the Bank of England. Transfer from our account to the account of the Commissioners of Customs pounds." That is filled up with the amount, 225*l.*, and signed "Barclay, Bevan & Co." Now what does that mean? It means that Barclay, Bevan & Co. say, "You, the Bank of England, have got in your books an account to our credit; you have also in your books a credit to the account of the Commissioners of Customs, and we, Barclay, Bevan & Co., ask you to transfer from our account to the account of the Commissioners 225*l.*" That document, in the terms of s. 32, entitles or purports to entitle the Commissioners of Inland Revenue to payment of or to draw upon the Bank of England for that sum of money. Therefore the document is taxable under the Act; the order comes within the definition of "bill of exchange" as given in the Act. Then comes the next question. Is the order to be stamped with a penny or with an ad valorem stamp? If it is a bill of exchange at all, there is no doubt that it is a bill payable on demand. The difficulty is to make out that it is a "bill of exchange." If we once arrive

at the conclusion that the order is a bill of exchange, it has obviously under the Act to be stamped with a penny stamp and not with an ad valorem stamp. I think it tolerably plain that it is a bill of exchange, notwithstanding the very ingenious arguments which have been addressed to us, and notwithstanding the case of *Buck* v. *Robson* (1), which related to an equitable assignment.

I come to the next point, namely, the question of exemption. The 10th exemption in the schedule under "bill of exchange" is "a bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue." The word "sole" presents a difficulty in Mr. Cohen's way to which I do not see an answer. I ask myself this—not as a lawyer, but as a business man—a person simply using business language: What is this document drawn for? What is the real purpose for which it is drawn? The real purpose is to get the release of the goods upon which the duty is payable. I cannot shut my eyes to that. The method of doing it is by obtaining a remittance of money, or transfer of money, from one account to another; but, even if this transaction is "remitting" within the meaning of the Act, I cannot say this is a bill drawn "for the sole purpose of remitting" money to be placed to a revenue account. In the first case it obviously is not drawn for that sole purpose, because it is the merchant who takes his cheque to his bankers and gets this document. What for? To enable him to get the goods. In the second case, what does the custom house officer take it for? He takes it as an authority to him to release the goods. He might take the cheque and get it cashed, but what he wants is an authority to release the goods, and that is the object of his obtaining the order. The bill is drawn for the purpose in both cases of getting a release of the goods. Therefore I cannot come to the conclusion that the bill in either case is drawn for the sole purpose of remitting money to a revenue account. There is another ground which has been pointed out for coming to the same conclusion, namely, that if we look

(1) 3 Q. B. D. 686.

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into the history of this clause the real object of it is that, when public money has been collected by somebody whose duty it is to remit it to headquarters, the instrument by which it is remitted shall not require a stamp. I do not doubt that is the real meaning of the clause, but, whichever way we look at it, whether stress is laid on the word "sole" (which to my mind makes it plain), or whether stress is laid on the word "remitting," the conclusion is the same. The appeal must therefore be dismissed.

KAY L.J. Mr. Cohen's very ingenious argument first of all was that s. 32 had two branches, one which applies to bills of exchange not payable on demand, and the other to bills of exchange payable on demand, and that the first part does not apply at all to a bill of exchange payable on demand. I confess I am not able to agree with that argument. The first part seems to me to be a definition for the purposes of the Act of bills of exchange generally, including both bills of exchange payable on demand and bills of exchange not payable on demand. Then the second branch provides that the words "bill of exchange payable on demand" shall include certain instruments as to which it might have been doubted but for those words whether they would come within the description of "payable on demand." That, I think, is the function of the second part of the section, and, unless the first part included bills payable on demand, we should have in the Act no definition at all of "bills of exchange payable on demand." There is an enlargement of the words "on demand" to include the cases mentioned in sub-ss. (*a*) and (*b*). But what is a bill of exchange payable on demand? Except that it includes those things it would be left out of the Act altogether, and there would be nothing in the Act to say that a cheque payable on demand is a bill of exchange, and yet the Act would say that a cheque not payable on demand was a bill of exchange. It really reduces the matter to an absurdity to read s. 32 in the way contended for by the appellants. The first part is a general definition of what for the purposes of the Act shall be considered bills of exchange, and the second

part an enlargement of the words "payable on demand" to include the particular cases which are mentioned in sub-ss. (*a*) and (*b*).

I quite agree that Mr. Cohen was right in laying principal stress upon the second of the two documents before us. The first of them was obtained in this way. A merchant owes customs duty on goods which are in the hands of the customs. He cannot get them freed without payment of duty. He goes to his bankers, draws a cheque for the amount, and gets from the banker an order of transfer. He knows he cannot by merely handing a cheque to the custom house people obtain a release of the goods. They are not entitled to take a cheque; but if he gets this transfer order to transfer the amount of the duty from his bankers' account to the account of the Commissioners of Customs, then when he puts that into the hands of the custom house officer he can get the release of his goods. The custom house officer for his own purposes then hands the transfer order to the Bank of England, and gets the transfer of the money from the account of the banker to the account of the Commissioners of Customs.

The second case looks a little more favourable to Mr. Cohen's argument. In this case the merchant draws a cheque and hands it to the custom house officer. The custom house officer cannot release the goods on getting the cheque; but he takes it to the merchant's bankers and obtains a transfer order, and when he gets the transfer order, and not before, he treats himself as having been paid the duty, and gives the release of the goods.

Those are the two transactions, and when they are examined closely it seems to me one of them is not more favourable to Mr. Cohen's contention than the other. Looking at s. 32, does this transfer order come within the words of it or not? The words include amongst other things "any document or writing (except a bank-note) entitling or purporting to entitle any person, whether named therein or not, to payment by any other person of, or to draw upon any other person for, any sum of money." Does not this entitle the Commissioners of Customs to payment of the money therein mentioned? I think it does. If it does

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not, it certainly comes within the other branch, because the moment the transfer is effected the Commissioners would have the right to draw upon their account increased by the amount of that transfer, and therefore it would entitle them to draw. Now observe the words are only—a document "entitling or purporting to entitle any person" to draw. It may be (one can imagine such a case) that they never could draw by reason of their account being overdrawn for a larger amount before they got the transfer order; but that makes no difference whatever—the document would still be a document entitling them to draw if, according to the arrangement with their bankers on their own account, they were able to draw. Therefore I have no doubt that these documents come within one or other of the above expressions in s. 32; and I should be rather inclined to say that they are documents entitling the Commissioners of Customs to payment than entitling them to draw, because drawing is an incidental thing which follows not immediately upon the documents, but upon the transfer obtained under the documents. Supposing one of these documents were given and the goods released, and then the transfer were to take place, would not that be a payment? The document entitles the Commissioners to that process, and if the transfer took place it would support a plea of payment if an action were brought. Therefore it seems to me clearly to be a document entitling the Commissioners to payment. It is then a bill of exchange within the Act, and if a bill of exchange at all it is a bill of exchange payable on demand and liable as such to a 1*d.* stamp, and the Crown does not claim more.

The only remaining question is, Does this or does it not come within exemption 10? I agree that the word "remitted," if it stood alone, might be ambiguous, because in ordinary business transactions it is used in a very vague way and in a very large sense. It is common enough for a tradesman to send in his bill with a note saying he will be obliged by a remittance. There the word is used undoubtedly as an equivalent for payment. But does it mean here payment by anybody of a sum of money to a revenue account? I think it does not. The words are evidently limited. The expression is

not "for the purpose of remitting money &c." but "for the sole purpose of remitting money &c." Now, in either of the two cases which I have thus mentioned, could the transfer order, which amounts to payment and is received as payment, be said to be drawn "for the sole purpose of remitting money to be placed to any account of public revenue"? It seems to me impossible. In the second case, which is the one most favourable to the appellants, where the officer of customs receives the cheque himself, takes it to the merchant's bankers, and gets from them the transfer order, and by means of that transfer order obtains the transfer from the account of the bankers to the account of the Commissioners of Customs—is that "for the sole purpose of remitting"? Until he gets the transfer order it is admitted that he cannot release the goods. He cannot treat the cheque as payment. He gets the transfer order, and upon obtaining it he releases the goods; therefore the primary function and object and purpose of the transfer order, even in that second case, is to pay the customs duties and obtain release of the goods. It is a secondary purpose that it also enables the officer to pay the money, or to obtain payment of the money, to an account of public revenue. The truth is that it is one transaction by which two objects are carried out. If the money had been actually paid in cash into the hands of the officer and he had thereupon released the goods, his duty would have been then, using the word "remit" in its strictest meaning, to have remitted the money to the bank account of the Commissioners of Customs. Instead of going through the two operations they are combined in one, and by virtue of this order for transfer the payment is effected, and also subsequently or at the same time the cash is passed to the account of the Commissioners of Customs. Therefore it seems to me that this is a bill of exchange within the meaning of the Act, but it is quite impossible to say that it is a bill drawn "for the sole purpose of remitting money to be placed to any account of public revenue."

For these reasons I think the learned judges below were right in the decision they arrived at, and that this appeal must be dismissed.

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A. L. SMITH L.J. I agree. Lindley L.J. has so entirely expressed my views on this case that I shall, if he will allow me, adopt them as my own. I have nothing to add except that this appeal must be dismissed.

Appeal dismissed.

Solicitors: *Murray, Hutchins, Stirling & Murray; Solicitors of Inland Revenue.*

H. C. J.

C. A. 1896 *March* 24.

[IN THE COURT OF APPEAL.]

DARBYSHIRE AND OTHERS *v.* LEIGH AND ANOTHER.

Practice—Pleading—Document—Statement of Effect—Action for Recovery of Land—Order XIX., r. 21.

The plaintiffs in an action for the recovery of land having in their statement of claim briefly stated the effect of certain limitations in a will, as alleged by them, without setting out the precise words of the will:—

Held, that they were entitled so to do under Order XIX., r. 21, although a question arose as to the construction of the will.

APPEAL from an order of a judge at chambers made as after mentioned. The plaintiffs in an action for the recovery of land had delivered the following statement of claim.

(1.) The plaintiffs are entitled to the possession of the lands, hereditaments, messuages, and premises hereinafter set forth, that is to say. [Here followed particulars of the lands claimed.] (2.) On February 10, 1728, Mary Taberner was seised in fee and in possession of the said estates. (3.) On March 16, 1765, the said Mary Taberner married Holt Leigh, and they jointly levied a fine of the said estates to certain uses limited therein. (4.) By the will of the said Holt Leigh made on February 27, 1785, and duly proved July 18 of that year, the said Mary Taberner or Leigh became entitled to the said estates in fee in reversion on the determination of certain estates tail limited in the said will. (5.) The last of the said estates tail was determined by failure of the issue of the said Holt Leigh in or about the month of June, 1868. (6.) The plaintiffs claim to be entitled in fee to the said estates in reversion as the heirs-at-law of the said Mary Taberner or Leigh. (7.) The plaintiffs have been in possession of parts of the said estates down to

the month of May, 1887, from which they have been wrongfully and forcibly ousted by the defendants. (8.) The defendants wrongfully took and hold possession of the said estates. The plaintiffs claim possession of the said estates.

The defendants applied at chambers for an order that the plaintiffs should amend their statement of claim by setting forth the precise words of the will of Holt Leigh by virtue of which Mary Leigh became entitled to the said estates in fee in reversion as in the fourth paragraph of the statement of claim mentioned, or that in default thereof that paragraph should be struck out as embarrassing. The master refused to make the order applied for; but on appeal the judge at chambers reversed the decision of the master.

C. A. Russell, for the plaintiffs. The plaintiffs were entitled to plead as they have done under Order XIX., r. 21, which provides that "wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material." This is not a case in which the precise words of the document are material within the meaning of the latter part of the rule. That part of the rule was intended to preserve the old law by which in certain cases, such as libel or slander, it was necessary in pleading to set out the precise words: see *Harris* v. *Warre*. (1) The rule does not mean that, wherever there may be a question as to the construction of a document between the parties, the party pleading must set out the precise words. This would often involve setting out the whole of a long document, for it would be impossible for one party to determine what part of it the other party might think material. Construing the latter part of the rule as the defendants seek to construe it would almost nullify the first part of it, and render it nearly always necessary to set out documents, possibly of great length, verbatim, the necessity for which it was obviously the object of the rule to prevent. *Philipps* v. *Philipps* (2) is not in point, for there the effect of the documents relied upon was really not stated.

(1) 4 C. P. D. 125. (2) 4 Q. B. D. 127.

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Ambrose, *Q.C.*, and *R. Eaton White*, for the defendants. The plaintiffs have not complied with Order XIX., r. 21, for the precise words of the will are material in the present case. The case here depends on the effect of the limitations of the will, which involve a nice question of construction. The case of *Philipps* v. *Philipps* (1) is an authority to shew that this pleading is insufficient. Bramwell L.J. in his judgment there puts the case of a statement of claim stating that a certain person made a deed, the effect of which was that the plaintiff was entitled to possession, and says that such a pleading would be insufficient. He states that it is the object of the rules as to pleading that the defendant should be at liberty to say that the statement is not sufficient in point of law, and to raise the point on demurrer, and also that the defendant, instead of being driven to deny everything by an ambiguous and uncertain statement involving conclusions of law as well as actual facts, and so going down to try an expensive issue, may be at liberty to single out any one statement and to answer it. Demurrers are now abolished, but by Order XXV., r. 2, by way of substitute for them, there is a provision for having a point of law which is raised on the pleadings determined before the trial. This case depending on a question of law as to the construction of the limitations of the will, if they were set out in the statement of claim, the action might be disposed of under Order XXV., rr. 2, 3, without further expense. The defendants are entitled by the rules of pleading to have the contents of the will set out by the plaintiffs so as to raise the question of law and so dispose of the action. This mode of pleading deprives them of that right. The defendants cannot effect this object by themselves setting out the precise words of the will, for the plaintiffs would join issue, and the action could not then be disposed of by the decision of the question of law. [They also cited *Howard* v. *Hill* (2); *Williamson* v. *London and North Western Ry. Co.* (3); *Smith* v. *Buchan* (4); *Davis* v. *James* (5); Order XXXIV., r. 2.]

C. A. Russell, in reply.

(1) 4 Q. B. D. 127.
(2) W. N. (1887) 193.
(3) 12 Ch. D. 787.
(4) 36 W. R. 631.
(5) 26 Ch. D. 778.

LORD ESHER M.R. The sole question which we have to decide in the present case appears to me to be whether the plaintiffs have or have not pleaded so improperly in paragraph 4 of their statement of claim that that paragraph ought to be struck out. That question depends, in my opinion, entirely upon the terms of Order XIX., r. 21, and I do not think that we are concerned with the consequences which, according to the argument of the defendants' counsel, will result from our deciding in the plaintiffs' favour. In the case of *Philipps* v. *Philipps* (1) the distinction was pointed out between the material facts which it is necessary for a party to allege in pleading and to prove in order to support his case, which were called by Erle C.J. allegata probanda, and the facts which are the evidence by which those material facts are to be proved; and this distinction was illustrated by the case of an arbitrator stating a special case, who must find and state the material facts, but not the evidence upon which he finds those facts. Order XIX., r. 21, provides what is to be the proper method of pleading where a material fact is evidenced by a document. By that rule it is provided that "wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material." The plaintiffs here have complied with the words of the first part of the rule, by briefly setting out what they allege to be the effect of the will; but it is argued that the case falls within the latter part of the rule, and that the plaintiffs were bound to set out the precise words of the will as being material. There is no doubt that in the case of a document alleged to be a libel the latter part of the rule would apply, because in that case it is clear that it would not suffice to state the effect of the document, but the precise words must be stated. I will not say that this part of the rule is confined to the case of libel. Possibly there may be other cases to which it may apply, but the question is whether it is applicable in the present case. I do not think that it is. I think the plaintiffs have pleaded properly by stating the effect of the document

(1) 4 Q. B. D. 127.

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upon which they rely. It is said that the decision in *Philipps* v. *Philipps* (1) is to the contrary. But in that case the plaintiff in truth had not complied with the first part of Order XIX., r. 21. He had merely alleged that, under and by virtue of certain deeds, assurances, wills, and documents in the possession and control of the defendants, he was entitled to the possession of the hereditaments claimed by him. He did not state the effect of the documents upon which he relied. For these reasons I think this appeal must be allowed.

LOPES L.J. I think the learned judge at chambers decided wrongly in this case, probably because his attention was not sufficiently drawn to the terms of Order XIX., r. 21. That rule provides that, "wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly as possible, without setting out the whole or any part thereof." The intention expressed by these words seems clearly to be that, where a document is material, it shall not be necessary to set it out at length, but only to state the legal effect of it, the object apparently being to prevent such long pleadings as one has often seen, particularly in Chancery suits. The plaintiffs here have distinctly stated what they allege to be the legal effect of the will upon which they rely, and, therefore, have complied with the rule so far. But then it is said that the case comes within the latter words of the rule which are "unless the precise words of the document or any part thereof are material." I do not think that part of the rule is applicable to the present case. It applies, no doubt, to an action of libel, in which it was always necessary to set out the exact words alleged to be libellous. I do not say that there may not be other cases to which it would apply, but I do not think it is applicable to such a case as this. I cannot help thinking that it has reference to cases in which it is material for the purposes of the party pleading to state the precise words. I come to the conclusion on these grounds that the statement of claim is unobjectionable. The defendants' counsel stated that the defendants wish to take advantage of the provision of

(1) 4 Q. B. D. 127.

Order XXV., r. 2, which is a substitute for the proceeding by demurrer, now abolished. Possibly the defendants may be able to frame their defence in such a way as to be in a position to do so; but it is unnecessary for the purposes of the present case to decide whether that will be so or not. The case of *Philipps* v. *Philipps* (1) was relied upon for the defendants. But that case was quite different from the present. There the plaintiff did not state the legal effect of any document, but only stated that the general result of documents in the defendants' possession was that he was entitled to the possession of the hereditaments he claimed. It is obvious that that mode of pleading is essentially different from that adopted by the plaintiffs in this case. I agree that the appeal should be allowed.

RIGBY L.J. I am of the same opinion. The real question before us is whether the plaintiffs' pleading is in accordance with Order XIX., r. 21. The words of the first part of that rule distinctly state that it shall be sufficient in any pleading to state the effect of a document without setting out the whole or any part thereof; but, no doubt, they must be read with the proviso "unless the precise words of the document or any part thereof are material." The argument of the defendants' counsel seems to me really to come to this: that the precise words of a document must be set out wherever any question as to the construction of the document may arise between the parties. I cannot so interpret the rule. We know of one case at any rate, that of libel, in which it never was permissible to state merely the effect of the document, and the proviso was, no doubt, necessary for the purpose of preserving the existence of that rule. There may possibly be other cases to which it would apply, and it would perhaps be rash to say that it only applies to libel. But I feel satisfied that it was not intended to enable one party to interfere with the pleadings of the other on the ground that a question of construction might arise upon the document mentioned in the pleadings. We were referred to Order XXV., r. 2, as conferring a right upon the defendants of which they were deprived by the mode of pleading here adopted. That

(1) 4 Q. B. D. 127.

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rule provides that any party shall be entitled to raise by his pleading any point of law. The defendants' counsel, as it appears to me, wish us to read that rule as meaning that any party shall be entitled to make the other party raise by his pleading any point of law. I see no justification for that construction of the rule.

Three cases were relied on for the defendants, which appear to me really to have no bearing on the point now raised. In the case of *Howard* v. *Hill* (1) the plaintiffs sought to have an election to an office in a society declared invalid, and objection was taken to the statement of claim as not shewing with reasonable clearness a cause of action. Counsel for the defendants sought to refer to rules of the society, the effect of which could not be gathered from the statement of claim, in order to shew that there was no cause of action; but it was held that they could not do so. That decision seems to me to have nothing to do with the present question. In *Williamson* v. *London and North Western Ry. Co.* (2) Hall V.-C. said that it was not proper in a pleading to refer to an independent document such as an answer to interrogatories without giving its effect, so that the pleading was unintelligible without referring to the document. I have no doubt that was a correct decision, but it does not apply to the pleading now before us. In *Smith* v. *Buchan* (3) judgment was asked for on the statement of claim in default of pleading in an action for specific performance. There being no sufficient description of the property in the statement of claim, the plaintiff sought to supplement it by referring to a description of the property in the schedule to the agreement which was referred to in the statement of claim. Kay J. held that, when called on to give judgment on the pleading, he could not refer to a document the effect of which did not appear on the pleading. I have no doubt these decisions were correct, but they seem to me immaterial to the present case.

The defendants' counsel have endeavoured to deduce from what Bramwell L.J. said by way of illustration in *Philipps* v.

(1) W. N. (1887) 193. (2) 12 Ch. D. 787.
(3) 36 W. R. 631.

Philipps (1) a rule to bind us in the present case. I think what he so said was clearly right. It was to this effect. Suppose a plaintiff alleged in his pleading that some person made a deed and that under that deed he was entitled to possession of the land claimed, without mentioning what the nature of the deed was, or anything else about it. The gist of that allegation is merely that the plaintiff is entitled to possession. It is clear that it is not competent to a party to state generally that he is entitled to possession. That was really what the plaintiff did in *Davis* v. *James*. (2) The pleading in that case stated that "in the year 1875 the plaintiff became, and he thenceforth during the remainder of the term remained, and he was at the expiration of such term entitled to the immediate reversion" in the lands in question. It did not shew how he became entitled to the reversion, or what the reversion to which he became entitled was. Kay J. held that that pleading was not sufficient. The grounds upon which he proceeded are shewn by a quotation which he made from Stephen on Pleading to the effect that "where a party claims by conveyance or alienation, the nature of the conveyance or alienation must in general be stated, as whether it be by devise, feoffment, &c." It is impossible to doubt that his decision in that case was right, and that it was precisely in accordance with the decision in *Philipps* v. *Philipps* (1) and the reasoning on which it was based. But both those cases are entirely different from the present.

Appeal allowed.

Solicitors for plaintiffs: *Cartwright & Cunningham, for Donnison & Edwards.*

Solicitors for defendants: *White, Borrett & Co.*

(1) 4 Q. B. D. 127. (2) 26 Ch. D. 778.

E. L.

1896
March 24, 25.

COOPER, Appellant; PEARSE, Respondent.

Landlord and Tenant—Compensation for Crops—"Allotment," what is—Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 *Vict. c.* 26), *s.* 4.

By s. 4 of the Allotments and Cottage Gardens Compensation for Crops Act, 1887, "allotment" means (inter alia) "any parcel of land of not more than two acres in extent held by a tenant under a landlord and cultivated as a garden":—

Held, that a piece of land less than two acres in extent, occupied by a seedsman for the purposes of his business, and having in it vegetables, fruit trees, and flowering plants which he sold, was not "cultivated as a garden," and was, therefore, not an "allotment" within the definition in s. 4.

Case stated, under the Summary Jurisdiction Acts, by justices of the borough of Bedford.

The appellant applied to the justices at petty sessions, under the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), for the appointment of an arbitrator in respect of a claim which he had made for compensation for crops growing upon land held by him as tenant to the respondent on a tenancy which expired March 25, 1895, and for labour expended upon, and manure applied to, the appellant's holding since the taking of the last crop therefrom.

The following material facts were proved or admitted before the justices:—

The appellant was a seed-merchant carrying on business in the borough of Bedford, and up to March 25, 1895, was tenant, under an agreement in writing, of a piece of land less than one acre in extent, in that borough, of which land the respondent was owner.

The tenancy expired on March 25, 1895, by notice to quit.

The land had been occupied by the appellant as a garden. At the expiration of the tenancy there was a quantity of flower roots, vegetables, and bulbs on the ground, and since taking the last crop the appellant had expended labour and manure on the land.

The appellant delivered particulars of his claim, which

amounted to 159*l*. The bulbs were grown for appellant's use. He would sell them. He had had on the land potatoes, peas, flowering plants, trees, fruit trees and shrubs, and had had several rows of one sort of plant. The bulbs were put in in the autumn of 1893, and they would not be fit to take up until July, 1895.

The justices refused the application on the grounds that the appellant's holding was not an "allotment" within the meaning of the Allotments and Cottage Gardens Compensation for Crops Act, 1887, and that the bulbs for which compensation was claimed were not crops growing upon the holding in the ordinary course of cultivation.

The case as originally stated was amended by order of the Court, and in the amended case the justices stated that they found that "the appellant was a seedsman, and that the holding was occupied by him for the purposes of his business, and not as a garden in its ordinary acceptation, nor as a farm."

The questions for the opinion of the Court were: (1.) Whether the appellant's holding was an "allotment" within the meaning of the Allotments and Cottage Gardens Compensation for Crops Act, 1887 (1); (2.) Whether the bulbs claimed for were crops growing on the holding in the ordinary course of cultivation within the meaning of s. 5 (*a*) of that Act.

(1) The Allotments and Cottage Gardens Compensation for Crops Act, 1887 (50 & 51 Vict. c. 26), is entitled "An Act to provide compensation to the occupiers of allotments and cottage gardens for crops left in the ground at the end of their tenancies."

By s. 4, "In this Act 'allotment' means any parcel of land of not more than two acres in extent held by a tenant under a landlord and cultivated as a garden or as a farm, or partly as a garden and partly as a farm:

"'Cottage garden' means an allotment attached to a cottage:

"'Holding' means an allotment or cottage garden."

By s. 5, "Upon the determination of the tenancy of a holding after the commencement of this Act the tenant shall be entitled notwithstanding any agreement to the contrary to obtain from the landlord compensation in money for the following matters and things, that is to say—

"(*a*) For crops, including fruit, growing upon the holding in the ordinary course of cultivation, and for fruit trees and fruit bushes growing thereon, which have been planted by the tenant with the previous consent in writing of the landlord:

"(*b*) For labour expended upon and for manure applied to the holding since the taking of the last crop therefrom in anticipation of a future crop."

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W. Mackenzie, for the appellant. The justices ought to have granted the appellant's application for the appointment of an arbitrator. His holding was an "allotment" within s. 4 of the Act of 1887. There is no ground for narrowing the definition, and nothing in the Act to shew that its operation was intended to be restricted to a poor class of persons. On the contrary, the Act draws a distinction between "cottage gardens" and "allotments," which may be gardens, with no house attached. Size is the only test whether a garden is, or is not, an allotment. The Act was probably intended to be supplementary to the provisions of the Agricultural Holdings Act (England), 1883 (46 & 47 Vict. c. 61).

Reginald Brown, for the respondent. The appellant's holding was not a garden which is an allotment under the Act of 1887. The title of the Act shews that it was not intended to apply to persons carrying on the businesses of seedsmen or market gardeners. For such persons compensation is provided by the Market Gardeners' Compensation Act, 1895 (58 & 59 Vict. c. 27). A garden cultivated for profit is not within s. 4 of the Act of 1887, which applies only to a "garden" in the ordinary acceptation of the term. In Latham's English Dictionary "garden" is described as "a piece of ground enclosed and cultivated for herbs or fruits, or laid out for pleasure." The Act was intended to provide for compensation to a poor class of persons—such a class, probably, as is dealt with by the Allotments Act, 1887 (50 & 51 Vict. c. 48), which is "an Act to facilitate the provision of allotments for the labouring classes."

W. Mackenzie replied. (1)

LAWRANCE J. The Allotments and Cottage Gardens Compensation for Crops Act, 1887, is entitled "An Act to provide compensation to the occupiers of allotments and cottage gardens for crops left in the ground at the end of their tenancies." By s. 4, "'allotment' means any parcel of land of not more than two acres in extent held by a tenant under a landlord and

(1) The arguments of counsel on the second question asked in the case have been omitted, as no judgment was given by the Court on that question.

cultivated as a garden or as a farm, or partly as a garden and partly as a farm: 'Cottage garden' means an allotment attached to a cottage: 'Holding' means an allotment or cottage garden." Sect. 5 entitles the tenant, upon the determination of his tenancy of the holding, to obtain from his landlord compensation in money "for crops, including fruit, growing upon the holding in the ordinary course of cultivation, and for fruit trees and fruit bushes growing thereon, which have been planted by the tenant with the previous consent in writing of the landland." The first question is, was the appellant's holding an "allotment" within the meaning of the Act? In my judgment it was not. The magistrates have found as facts "that the appellant was a seedsman; that the holding was occupied by him for the purposes of his business, and not as a garden in its ordinary acceptation, nor as a farm." Upon those findings I am of opinion that the magistrates were justified in coming to the conclusion that the holding was not an allotment within the Act. I think that the appellant did not cultivate the land as a "garden" in the ordinary sense; he cultivated it for the purposes of his business as a seedsman in order to sell the produce. If that be so, this was not, in my opinion, an "allotment" to which the provisions of the Act applied at all. It is unnecessary to answer the second question asked in the case. I am of opinion that our answer to the first should be that the appellant's holding was not an "allotment" within the meaning of the Act.

COLLINS J. I am of the same opinion. I think that the title of the Act, which defines what the Act is, in itself carries one a long way towards a conclusion as to what is meant by "allotment." Then there are the definitions of "allotment," "cottage garden," and "holding" in s. 4. [The learned judge read them.] In dealing with cottage gardens the Act presumably means to deal with gardens occupied by the sort of persons who were likely to get the benefit of such Acts as the Allotments Act passed in the same year as the statute in question in this case. That statute deals with two classes of lands—"allotments" and "cottage gardens." I think that, with respect to

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allotments which are cultivated as gardens, it really means to deal with a class of persons in a small way who would otherwise be outside the Act because no cottage was attached to their allotment, and to entitle them to the same benefit as if their holding was a "cottage garden." I therefore approach this question, having regard to the consideration that the provisions of the statute are directed to a class of persons in a small way of life who are deemed by the Legislature to be proper recipients for the benefits given by Allotments Acts—persons who may be defined by reference to the Allotments Act of the same year, which is entitled "An Act to facilitate the provision of allotments for the labouring classes." That, I think, throws some light on what is meant by "allotment" in s. 4 of the Act under consideration in this case. You have a holding which may be used as a farm or a garden, and from which in the ordinary course crops or fruit may be expected—crops, I should suppose, from the farm, fruit from the garden. Taking the definition of "garden" found in a standard dictionary, it is "a piece of ground enclosed and cultivated for herbs or fruits for food, or laid out for pleasure." Is the appellant's piece of land a place where fruit and vegetables are grown for food, or a place laid out for pleasure? The magistrates have found that it is not. Unless we are bound as matter of law to hold that every piece of land, having an area within the limits specified by the Act, and having in any part of it fruit or vegetables, is "cultivated as a garden" within the meaning of the Act, it becomes a question of fact whether the particular place is "cultivated as a garden" in the ordinary sense, or is a place used by a seedsman or market gardener for the purposes of his business. In my opinion we cannot hold as matter of law that this place was an allotment because it was less than two acres in extent and fruit or vegetables or flowers were grown in it. If the question were tried by a jury it would be necessary for the judge to give them a direction as to what constituted an allotment within the statute. I think the proper direction in this case would be that if the piece of land was cultivated as a "garden" in the ordinary sense of being cultivated for food, or for pleasure, then it was an allotment within the meaning of the Act; but if it was a

place used by a seedsman or market gardener in his business, then it was not such an allotment. I am of opinion, having regard to the findings in the case, that the land occupied by the appellant was not "cultivated as a garden or as a farm, or partly as a garden and partly as a farm," and, therefore, was not an "allotment" within s. 4.

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Judgment for respondent.

Solicitors for appellant: *Crossman & Prichard, for Sharman & Trethewy, Bedford.*

Solicitors for respondent: *Maples, Teesdale & Co., for Theed Pearse, Bedford.*

W. A.

UNITED KINGDOM MUTUAL STEAMSHIP ASSURANCE ASSOCIATION *v.* HOUSTON & CO

1896

April 14.

Arbitration—Reference to Three Arbitrators—Award signed by Two only—Validity of Award.

Where a matter in dispute is referred to the decision of three arbitrators, all three must concur in the making of the award; an award made by two of them only is bad.

An agreement to refer disputes to arbitration provided for a reference to "the decision of one or of three disinterested arbitrators as mutually agreed," and that if three arbitrators were appointed one should be nominated by each of the parties, and the third by the two so nominated. Three arbitrators having been duly nominated and having entered upon the reference, two of them made an award from which the third dissented:—

Held, that the award was invalid.

TRIAL before Mathew J. without a jury.

The plaintiffs were a mutual insurance association which by its rules contracted to indemnify its members against (inter alia) liability for loss of goods, shipped or to be shipped on board vessels belonging to the members, without their default. The defendants were shipowners and members of the plaintiff association. An action having been brought against the defendants by the shipper of certain goods which had been lost, and judgment having been recovered against them, the defendants made a claim against the plaintiff association to be indemnified

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against the liability on the said judgment. By the rules of the plaintiff association it was provided as follows:—

"16. The sum (if any) to be paid in satisfaction of any claim shall in the first instance be settled by the committee. . . . If the member does not accept the decision of the committee, the matter in dispute shall, unless otherwise mutually agreed, be referred to the decision of one or of three disinterested arbitrators . . . . as mutually agreed. If three arbitrators be appointed, one shall be nominated by the member making the claim, one by the committee, and the third by the two so chosen, before the reference is proceeded with."

The defendants having refused to accept the decision of the committee upon their claim, the matter was agreed to be referred to three arbitrators, and three arbitrators were duly nominated in accordance with the above rule. The arbitrators met and heard the parties. Subsequently two of the arbitrators, the nominee of the committee and the third arbitrator, made and signed an award in favour of the plaintiffs. The other arbitrator, who dissented, refused to sign the award. The plaintiffs then brought an action upon the award so made to recover the amount of the arbitrators' fees and the taxed costs of the reference. The defendants contended that the award, having been made by two only of the arbitrators instead of by all three, was bad.

Joseph Walton, Q.C., and *T. F. Miller*, for the plaintiffs. The submission to arbitration having been made under rule 16, the question is whether the intention of that rule was that, when the reference was to three arbitrators, they must be unanimous. The rule provides that the reference is to be to one arbitrator or to three. What possible reason can be suggested for requiring the reference to be to an odd number except that of insuring that a decision shall be arrived at one way or the other by the votes of the majority. If three arbitrators are required to concur, the practical result will be that the arbitration will almost invariably be ineffective. The third arbitrator under the rule is substantially an umpire, the only difference being that an umpire, instead of joining in making

the award with the arbitrator with whom he agrees, makes his award all by himself.

Pickford, Q.C., and *T. Willes Chitty*, for the defendants. The award is bad. Three arbitrators are not the same thing as two arbitrators and an umpire. The distinction is carefully drawn in *Winteringham* v. *Robertson* (1), where the question was whether one of three referees could make an award by himself. It was held that as he was intended by the parties to be an umpire he could. Watson B. said: "There was no power to appoint a third arbitrator; if there had been, the effect would have been that the three must have made the award." The same distinction was drawn in *In re Smith & Service and Nelson & Sons.* (2) In that case, there being an agreement to refer a dispute to three arbitrators, one to be appointed by each party and the third by the two so appointed, one of the parties refused to appoint an arbitrator. The Court of Appeal held that they had no power under the Arbitration Act, 1889, to compel him to do so, there being in that Act "no provision as to three arbitrators as distinguished from two arbitrators and an umpire." (3)

Walton, Q.C., in reply. The passage cited from the judgment of Watson B. in *Winteringham* v. *Robertson* (1) is only a dictum. Of course, the parties may, if they choose, refer a matter to three arbitrators on the terms that they must all concur; but it is, a priori, highly improbable that they would ever do so. Their intention to refer on such terms must be evidenced by the clearest language. The mere fact that they call the third referee an arbitrator does not conclude the question.

MATHEW J. I am constrained by the language of the rule under which the submission to arbitration was made to decide this case in favour of the defendants. Rule 16 provides that a claim by a member against the association shall be decided in the first instance by the committee, and that, in the event of the member not accepting the decision of the committee, the matter in dispute should be referred to the decision "of

(1) 27 L. J. (Ex.) 301. (2) 25 Q. B. D. 545.
(3) 25 Q. B. D. 545, at p. 552.

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Mathew J.

one or of three disinterested arbitrators as mutually agreed." Here the defendants, having made a claim against the association, and refused to accept the decision of the committee, the dispute was referred to three arbitrators, who were appointed in the manner provided by the rule, one by each of the parties, and the third by the two so appointed. The arbitrators met, heard the evidence, and discussed the matter. The two appointed by the parties differed. The third, having heard all that either side had to say, drew up an award in favour of the association, which award was signed by himself and the arbitrator appointed by the association. The other arbitrator refused to concur in it. Then the association brought this action upon the award for the costs of the reference. I think the action cannot be maintained. For a reference to three arbitrators means that all three must concur in the making of the award. In the view I take of the meaning of the rule it is true, as Mr. Walton has pointed out, that arbitration under it can seldom have any result; for it will be rarely possible to get all three to agree in their decision. But if the parties desired to have an effective arbitration they should have framed their rule differently. The question is not what the parties might reasonably be assumed to have intended, but what they have said that they intended. Here I think the principle to be applied is exactly the same as if three persons' names had been inserted in the reference. They must all agree. The cases which have been cited shew that a distinction has been drawn between a reference to three arbitrators and a reference to two arbitrators and an umpire. It is said that the passage cited from the judgment of Watson B. is only a dictum. No doubt that is so; but it shews that he recognised the distinction. And the distinction is also recognised by the Court of Appeal in *In re Smith & Service and Nelson & Sons.* (1) I give judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs: *Crump & Son.*

Solicitors for defendants: *Pritchard & Englefield.*

(1) 25 Q. B. D. 545.

J. F. C.

SMITH *v.* HAMMOND.

1896
April 18, 20.

Practice—Writ—Address of Defendant—Order II., *r.* 3.

The defendant applied to set aside a writ of summons, which had been issued and served upon him in England, on the ground that by the writ the defendant was incorrectly described as of Lytham in the county of Lancaster, whereas his only place of business and address was at Londonderry in Ireland.

Held, refusing the application, that the incorrect statement of the defendant's address did not vitiate the writ, and it was good.

Application by the defendant to set aside a writ of summons, which had been issued and personally served upon the defendant in England, on the ground that in the writ the address of the defendant was incorrectly stated. The writ was addressed to the defendant, describing him as of Lytham in the county of Lancaster. The defendant stated in his affidavit that he had never resided or carried on business at Lytham, but that his only residence and place of business was at Londonderry in Ireland. The affidavit further stated that these facts were known to the plaintiff.

Loehnis, for the defendant. The writ is bad, and ought to be set aside. By Order II., r. 3, the writ is to be in one of the forms in the Appendix, and those forms contain the address of the defendant. This means his true address, and clearly the rule cannot be satisfied by giving an address which, as is the case here, must have been known to the plaintiff not to be the correct address of the defendant. There is authority for the contention that the address is required to be stated: *Sedgwick* v. *Yedras Mining Co.* (1); *The W. A. Sholten.* (2)

[Pollock B. In that case no address was stated.]

It is equally wrong to state an incorrect address. The defendant's statement that the plaintiff knew he resided in Ireland is not contradicted.

[Bruce J. referred to the Annual Practice for 1896, p. 218.]

(1) 35 W. R. 780. (2) 13 P. D. 8.

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T. G. Carver, for the plaintiff. The writ is sufficient. It would be unreasonable to expect the defendant's address to be stated in all cases, for it often happens that the plaintiff is unable to ascertain the address. There is no positive provision in the Rules that the defendant's address must be stated. On the other hand, in dealing with the statement of the plaintiff's address the Rules are positive and distinct: Order IV., rr. 1, 2, 3. The balance of authority is in the plaintiff's favour: *The Helenslea* (1); *Zuccato* v. *Young* (2); *Fry* v. *Moore* (3); *Wilding* v. *Bean*. (4)

Lòehnis replied.

POLLOCK B. I think that Mr. Carver's contention is right, and that this is a good writ. The rule as to the form of the writ is Order II., r. 3, which provides that "The writ of summons for the commencement of an action shall, except in the cases in which any different form is hereinafter provided, be in one of the Forms Nos. 1, 2, 3, and 4 in Appendix A, Part I., with such variations as circumstances may require." In Form 1 we find the words "To C. D. of in the county of ," and similar words in the other forms referred to. Here the writ is directed to the defendant, describing him as of Lytham in the county of Lancaster. That no doubt is an incorrect description, but it really is not very different from an ordinary case of misnomer, as if, for instance, as North J. said in *Zuccato* v. *Young* (2), "a defendant named John had been sued as James." If the writ is not a writ for service out of the jurisdiction the plaintiff is entitled to use it for the purpose of service within the jurisdiction.

In the present case there is a mistake in the description, but nothing has been done which is contrary to the spirit of the Rules, and the defendant does not appear to have been in any way misled or prejudiced. *Sedgwick* v. *Yedras Mining Co.* (5) was different from the present case, being an action against a foreign company, and there it was held that the writ ought to

(1) 7 P. D. 57.
(2) 38 W. R. 474.
(3) 23 Q. B. D. 395.
(4) [1891] 1 Q. B. 100.
(5) 35 W. R. 780.

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be in Form 5 or 6, and not in Form 2. The other cases which have been referred to are in favour of the view which I have expressed.

For these reasons I am of opinion that the defendant's motion ought to be dismissed with costs.

BRUCE J. I am of the same opinion. There is no express rule in the Rules under the Supreme Court of Judicature Acts requiring the address of the defendant to be stated on the writ of summons, whereas, on the other hand, the Rules give very precise directions as to the statement of the address of the plaintiff, as will be seen by reference to Order IV., rr. 1, 2, 3. We ought not to add formalities which the Acts and Rules do not require. It is true that in the form of writ given in the Appendix the defendant is described as "of" such and such a place; but that is inserted for the purpose of identification.

Application refused.

Solicitors for plaintiff: *Colt & Ince, for Rigby, Liverpool.*

Solicitors for defendant: *Rowcliffes, Rawle & Co., for Hill, Dickinson, Dickinson & Hill, Liverpool.*

P. B. H.

C. A.
1896
April 21.

[IN THE COURT OF APPEAL.]

KISSAM *v.* LINK.

Practice—Evidence—Bankers' Books—Legal Proceeding in England—Order to inspect Bankers' Books in Scotland—Bankers' Books Evidence Act, 1879 (42 & 43 *Vict. c.* 11), *ss.* 7, 10.

In a legal proceeding in England, the Court or a judge has power, under s. 7 of the Bankers' Books Evidence Act, 1879, on the application of any party to the proceeding, to order that such party shall be at liberty, for the purposes of such proceeding, to inspect and take copies of any entries in a banker's book in either of the other divisions of the United Kingdom.

APPEAL from an order of a judge at chambers.

Application was made on behalf of the plaintiff to Cave J. at chambers for an order under s. 7 of the Bankers' Books Evidence Act, 1879 (1), that the plaintiff should be at liberty to inspect and take copies of the entries in the books of the defendant's bankers. The bankers had their offices and carried on business in Scotland. The learned judge declined to make the order on the ground of want of jurisdiction.

The plaintiff appealed.

A. T. Lawrence, for the plaintiff. There was jurisdiction to make the order. The objection raised is that if an order is made there is no power to enforce it; but, even if this is the case, the objection cannot affect the provisions of the Act which apply to the United Kingdom and contain no limitation requiring the order to be made within the jurisdiction of the Court or judge who is asked to make it. If the Act is not applicable in such a case as this, bankers would lose the benefit of the Act in the cases in which they would be put to the greatest inconvenience by being subpœnaed to give evidence. No banker would refuse to comply with such an order and run the risk of being

(1) 42 & 43 Vict. c. 11, s. 7: "On the application of any party to a legal proceeding a Court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings."

compelled to appear under 17 & 18 Vict. c. 34. [He cited *In re Marshfield* (1); *Arnott* v. *Hayes*. (2)]

C. C. Scott, for the defendant. Sects. 7 and 8 of the Bankers' Evidence Act, 1879, shew that the bank on which an order under the Act is made must be one within the jurisdiction. The former section speaks of an order being made with or without summoning the bank, and provides for service of the order, and s. 8 gives a discretion to order the costs in certain cases to be paid by the bank. These are powers that can only be exercised within the jurisdiction, and no attachment could issue for non-compliance with the order of the Court. Sect. 8 provides that certain orders may be enforced as if the bank were a party to the proceeding; but this power is limited to the orders as to costs dealt with in that section. If an order is made in this case, the inspection must take place in Scotland, although the general scope of the Act shews that everything to be done under it must be done within the jurisdiction of the Court making the order.

LORD ESHER M.R. The only point in this case is whether, with respect to a legal proceeding in England, a judge of the High Court may make an order for inspection of bankers' books in Scotland. Sect. 7 of the Act says that the Court or a judge may make an order for inspection, and s. 10 defines what the expression "judge" means thus: "The expression 'a judge' means with respect to England a judge of the High Court of Justice, and with respect to Scotland, a Lord Ordinary of the Outer House of the Court of Session, and with respect to Ireland, a judge of the High Court of Justice in Ireland"; and it is provided that "the judge of a county court may with respect to any action in such Court exercise the powers of a judge under this Act." It is clear that the meaning is that where an order is asked for in a legal proceeding in England it must be made by a judge in England, and in the cases of Scotland and Ireland the order must be made by judges there. Then can a judge in one part of the United Kingdom make an order affecting a banker in another part? There is certainly

(1) 32 Ch. D. 499. (2) 36 Ch. D. 731.

C. A. 1896

KISSAM v. LINK.

Lord Esher M.R.

nothing in the Act that limits the power to make an order under it to the case of bankers within the jurisdiction of the judge making the order. The Act applies to the whole of the United Kingdom, and I can only come to the conclusion that it was intended to have general application over the United Kingdom, and not to be limited in the manner suggested. I think, therefore, the appeal should be allowed.

A. L. SMITH L.J. I am of the same opinion. It has been pointed out that the Act applies to all three portions of the United Kingdom. It applies to legal proceedings taken in any portion of the United Kingdom, and the Court or a judge of that part of the United Kingdom where the proceeding is set on foot may be asked to make an order for inspection, and there is nothing in the Act to limit the power of making such an order to take effect out of the jurisdiction of the judge making it. It is said this limitation must be implied by reason of the fact that there is no machinery by which the order could be enforced out of the jurisdiction. I am not sure whether such an order could not be enforced in some roundabout way; but, whether it could or not, the argument is not sufficient to convince me that this Act, which was intended to relieve bankers and simplify the giving of evidence, ought to be limited so as to exclude the cases in which it would be most useful.

RIGBY L.J. This Act was intended to relieve English, Scottish and Irish bankers from an obligation of an onerous nature under which they rested. It would be natural to suppose that it would give relief in the cases in which the obligation was most onerous, and would, as in the present case, relieve a banker in Scotland from attendance at a trial in England. If it be true that the Act provides no means of enforcing such an order, I should not be deterred from saying that the Act must be taken to mean what it says, even if I were satisfied, as I am not, that there exist no other means of enforcing it. The order is rightly made by a judge having jurisdiction in that part of the United Kingdom where the legal proceeding is pending, and I have no difficulty in saying that under the Act he has jurisdic-

tion to make an order to have effect in another portion of the United Kingdom. I agree, therefore, that this appeal should be allowed.

Appeal allowed.

Solicitor for plaintiff: *C. F. Martelli.*
Solicitor for defendant: *Richard Davies.*

A. M.

THE QUEEN *v.* PAYNE AND COOPER.

1896
April 14.

Contempt of Court—Publication tending to influence Result of Proceedings—Newspaper Comments.

An application was made for an attachment against the respondents, for contempt of Court in publishing certain articles in a newspaper. It appeared that the applicant, who had been sub-editor and manager of the paper, was charged with attempted arson, and remanded. An article was then published in the paper, alluding to the facts that the property of the newspaper company was for sale, and that the applicant had been arrested, and the charge of arson was pending. That charge was dismissed, but others were preferred, on two of which the applicant was committed for trial. While he was awaiting trial an article was published, announcing that one of the respondents had purchased the paper, and appealing for support, and alluding to the charges pending against the applicant, and shortly afterwards a report was published of a meeting of a committee of a county council, at which a resolution was carried that the action of the chief constable in obtaining legal assistance for the police in the case of the prosecution pending against the applicant should be confirmed:—

Held, that the publications in question did not appear to be intended, and were not calculated, to prejudice the fair trial of the charges pending against the applicant, and therefore no attachment ought to issue.

AN order nisi had been obtained on behalf of the applicant, Gowen, calling upon the respondents, Payne and Cooper, to shew cause why a writ of attachment should not issue against them for contempt of Court, for writing, printing, and publishing in the *Huntingdonshire Post* of November 30, 1895, and February 15, 1896, certain comments relating to the applicant, and, in the same newspaper of March 7, 1896, a report of a meeting of the standing joint committee of the Hunts County Council, whereat a question as to confirming the action of the chief constable in obtaining legal assistance for the police in a

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case against the applicant was discussed, the applicant being, at the time of the publications, under remand or committal for trial at the assizes on charges of larceny and embezzlement.

The facts disclosed by the affidavits, so far as material for the purpose of this report, were as follows:—

The *Huntingdonshire Post* was published at Huntingdon by the Huntingdonshire Post Company, Limited, and up to November 22, 1895, the applicant, Gowen, was sub-editor and manager. On November 28, 1895, the applicant was charged with attempting to set fire to the premises of the company, and remanded to December 5.

On November 30 an article appeared in the newspaper, written by the respondent Payne, and entitled "On Sale," which alluded to the facts that the property of the company was for sale, and that the applicant had been arrested, and the charge of arson was pending against him. This article contained the following passages: "At all events a systematic suppression of all letters, an elaborate and unauthorized correspondence in his employer's name on his own behalf appears to be the only necessary step to be taken by a sufficiently skilful and dishonest person in a position of trust in such offices"; and, "It was evident that they had been the victims of an elaborate and prolonged system of fraud."

On December 5 the charge of arson was dismissed.

On December 14 a report was published in the paper of an extraordinary meeting of the shareholders of the company, at which it was resolved that the company should be wound up voluntarily.

The applicant was further charged with forgery, larceny, and embezzlement, and at the assizes in January, 1896, the bill for forgery was thrown out by the grand jury, but true bills were returned for larceny and embezzlement, and the trial was postponed to the assizes to be held in May, 1896.

Shortly before February 15, 1896, the respondent Cooper purchased the *Huntingdonshire Post* from the liquidator of the company. On February 15, 1896, the respondent Cooper published in the paper an article entitled "The *Huntingdonshire Post* under New Management," announcing the fact that he

had purchased the paper, and appealing for support. This article contained the following passage: "As our readers are aware, owing to most unfortunate occurrences, the company has been in liquidation, the cause of which has to some extent been reported in our columns, and further information on the subject will probably become public after the assizes to be held in Huntingdon in May. Meanwhile it is obviously our duty to make no further reference to the matter."

On March 7, 1896, a report was published in the paper of the proceedings at a meeting of the standing joint committee of the Hunts County Council, at which a resolution was carried that the action of the chief constable in obtaining legal assistance for the police in the case of the prosecution pending against the applicant should be confirmed. A resolution had been passed that the meetings of the committee should be open to the press, and accounts of the proceedings at such meetings were commonly published in the local newspapers.

On March 25 the order nisi was granted.

Shearman, for the respondent Payne, and *Dickens*, *Q.C.* (*Brooke Little* with him), for the respondent Cooper, appeared to shew cause, but were stopped by the Court.

Poyser, for the applicant Gowen, in support of the order nisi. The publications complained of amount to contempt of Court, within the meaning of the decided cases, for they contain comments on pending proceedings, and are calculated to influence the minds of those from whom the jury at the assizes will be selected, and to prejudice the applicant's chance of a fair trial: *In re Crown Bank*, *In re O'Malley* (1); *Coats* v. *Chadwick*. (2)

This is especially the case with regard to the article of February 15, which states that "further information on the subject will probably become public after the assizes." The present is a stronger case than either of the two referred to, because here the pending proceedings are criminal.

LORD RUSSELL of KILLOWEN C.J. In this case an order has been obtained, calling upon the respondents, Payne and

(1) 44 Ch. D. 649. (2) [1894] 1 Ch. 347.

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Cooper, to shew cause why they should not be committed for contempt of Court, in printing and publishing certain articles referring to the applicant, Gowen, he being a person who is awaiting his trial at the next Huntingdon Assizes for larceny and embezzlement, which articles he alleges tend to prejudice him in the eyes of the jury who are to try him. I am of opinion that the application is unfounded, and the order ought to be discharged with costs; but I wish to express the view which I entertain, that applications of this nature have in many cases gone too far. No doubt the power which the Court possesses in such cases is a salutary power, and it ought to be exercised in cases where there is real contempt, but only where there are serious grounds for its exercise. Every libel on a person about to be tried is not necessarily a contempt of Court; but the applicant must shew that something has been published which either is clearly intended, or at least is calculated, to prejudice a trial which is pending. Now it appears in the present case that on November 28, 1895, the applicant Gowen had been arrested on a charge of attempted arson, and on November 30 the first of the articles complained of was published. In my opinion that article is no more than an explanation, and I think not an unreasonable explanation, for the information of the shareholders and other persons interested in the company which was carrying on the paper. The article states facts which no doubt do imply that the applicant was charged with attempted arson, and he was in fact then so charged; but on December 5 the charge in question was dismissed, so that at the date when the application for the order nisi was made no charge of arson was pending. Then there are the articles of December 14, 1895, and February 15 and March 7, 1896. In my opinion those articles contain perfectly innocuous statements. The last article consists of a fair report of the proceedings of a public body. No doubt in the course of those proceedings certain statements were made which were necessarily ex parte; but it seems to me perfectly ridiculous to suggest that the publication of those statements would prejudice the trial which was pending. We have been referred to certain cases in the Chancery Division of the High Court as

authorities in support of the present application. I will not refer to those decisions further than to say that, in my opinion, in some instances, the Courts have gone rather too far. In a very similar case to the present, *Hunt* v. *Clarke* (1), an application to commit for contempt of Court was refused by Mathew and Grantham JJ. The applicant then appealed to the Court of Appeal, and the order of the Divisional Court was upheld. In giving judgment in that case Cotton L.J., after referring to several cases, and particularly to the judgment of Jessel M.R. in *In re Clements, Republic of Costa Rica* v. *Erlanger* (2), continued as follows: "Now that I apply and adopt as the principle which ought to regulate these applications—that there should be no such application made unless the thing done is of such a nature as to require the arbitrary and summary interference of the Court in order to enable justice to be duly and properly administered without any interruption or interference, that is what we have to consider, and in my opinion, although, as I say, there is here that which is technically a contempt, and may be such a contempt as to be of a serious nature, I cannot think there is any such interference, or any such fear of any such interference, with the due conduct of this action, or any such prejudice to the defendant who is applying here, as to justify the Court in interfering by this summary and arbitrary process. When it is clear and evident on the facts of the case and on the documents . . . . that such is the case, in my opinion no such application ought to be made." (3) I wish to adopt the view of the law stated by Cotton L.J. in that judgment.

For the reasons which I have given I have come to the conclusion that the order nisi which has been granted in the present case ought to be discharged with costs.

WRIGHT J. I agree with all that the Lord Chief Justice has said, and I only wish to add that, in my opinion, in order to justify an application to the Court the publication complained of must be calculated really to interfere with a fair

(1) 58 L. J. (Q.B.) 490; 37 W. R. 724. (2) 46 L. J. (Ch.) 375.
(3) 58 L. J. (Q.B.) at p. 493.

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trial, and, if this is not the case, the question does not arise whether the publication is so objectionable in its terms as to call for the interference of the Court. If the publication is found to be likely to interfere with a fair trial, a second question arises, whether, under the circumstances of the case, the jurisdiction which the Court in that case possesses ought to be exercised, not so much for punishment as for preventing similar conduct in the future. That is the rule which I wish to adopt with regard to applications of this nature.

Order discharged.

Solicitor for applicant: *A. G. Watts, for W. A. Watts, St. Ives.*

Solicitors for respondent Payne: *Shearman & Rayner.*

Solicitors for respondent Cooper: *Peacock & Goddard, for Maule & Sons, Huntingdon.*

P. B. H.

1896

April 14.

KIRKWOOD *v.* SMITH AND ANOTHER.

Promissory Note — Document containing unnecessary Provisions — Bills of Exchange Act, 1882 (45 & 46 *Vict. c.* 61), *s.* 83, *sub-s.* 3.

The plaintiff sued as indorsee of a document, described as a promissory note, which provided for payment of certain money by instalments, the whole to become due on default in payment of any one instalment, and contained the following clause: "No time given to, or security taken from, or composition or arrangements entered into with, either party hereto, shall prejudice the rights of the holder to proceed against any other party":—

Held, that the document was not a promissory note, and could not be sued on as such.

APPEAL from a county court. The particulars were as follows:—

"In the county court of Hampshire holden at Southampton. Between John Kirkwood, trading as the Provincial Union Bank, plaintiff, and Harrietta Ann Smith, and Clara Maude Smith, defendants. The plaintiff claims 15*l.* 12*s.* 6*d.*, for balance of principal and interest, due to him as the indorsee of a promissory note, of which the following is a copy:—

"'£15 : 0 : 0. Brighton 5th December 1894. We jointly

and severally promise to pay the Southern Counties Deposit Bank Limited, or order, the sum of fifteen pounds for value received, by instalments, in manner following, that is to say, the sum of one pound on the fifth day of January next, and the sum of one pound on the fifth day in every succeeding month, until the whole of the said fifteen pounds shall be fully paid, and, in case default is made in payment of any one of the said instalments, the whole amount remaining unpaid shall become due and payable forthwith, together with interest at the rate of a halfpenny in the shilling per week from the date of such default, on the aggregate amount of the instalments then remaining unpaid, until the actual payment thereof. No time given to, or security taken from, or composition or arrangements entered into with, either party hereto, shall prejudice the rights of the holder to proceed against any other party.

"'Payable at 69 Ship Street Brighton.

"'Harrietta Ann Smith.

"'Clara Maude Smith, her daughter.'

"Indorsed, for the Southern Counties Deposit Bank Co. Limited, by two directors, the manager, the secretary, and the liquidator."

The plaintiff sued on the above document, adopting the summary procedure provided by 18 & 19 Vict. c. 67 (1), with relation to bills of exchange and promissory notes. The county court judge held that the document was not a promissory note, and therefore the summary procedure was not applicable, and gave judgment for the defendant, but gave the plaintiff leave to appeal.

Daldy, for the plaintiff. The document in question is a promissory note: Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 83. The sum payable is a sum certain, within the meaning

(1) Repealed, subject to certain exceptions and qualifications, by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 3; but s. 7 of that Act provides that, "If and so far as any enactment repealed by this Act . . . . applies . . . . to any inferior court of civil jurisdiction, such enactment shall be construed as if it were contained in a local and personal Act specially relating to such court, and shall have effect accordingly."

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of the Act: s. 9. The document does not order any act to be done in addition to the payment of money. The mere fact that the document contains something more than is necessary to give it validity does not prevent its having effect as a promissory note: *Jury* v. *Barker*. (1) In Byles on Bills, 15th ed. p. 13, the law is thus stated: "A promissory note is not the less a note because it contains a recital that the maker has deposited title-deeds with the payee as a collateral security, or a pledge of collateral security with power to sell, or because it refers to an agreement, where it does not appear that the agreement qualifies the note. But an agreement in the instrument to give further security in future would invalidate it as a promissory note"; and *Jury* v. *Barker* (1) is referred to.

J. E. Bankes, for the defendant. The decision of the county court judge was right. The money is not payable "at a fixed or determinable future time," within the meaning of s. 83. Moreover, the document contains a proviso, which is inconsistent with its being a promissory note. In *Davies* v. *Wilkinson* (2) Lord Denman C.J. said: "The first objection is, that this instrument was improperly received in evidence, being a promissory note not duly stamped. It is a note, up to a certain point, but it ends, '95*l.* to go as a set-off for an order of Mr. Reynolds to Mr. Thompson, and the remainder of his debt owing from C. Davies to him.' I think that takes from it the character of a promissory note, and makes it an agreement, and that it was properly received." (3) That statement is applicable to the present case, and the law is not altered by the Bills of Exchange Act, 1882. It is admitted that the plaintiff could have sued on this document as an agreement, if there had been a sufficient assignment; but the only question raised on this appeal is, whether the summary procedure applicable in actions in county courts on bills of exchange and promissory notes can be made available in an action on this document.

Daldy, replied.

LORD RUSSELL of KILLOWEN C.J. The point raised in this case is a small one, but it is, nevertheless, a point of some

(1) E. B. & E. 459. (2) 10 A. & E. 98.
(3) 10 A. & E. at p. 104.

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importance. It is not denied on the part of the defendant that this document is an agreement, on which the plaintiff could have sued, if it had been duly assigned to him, and if he had adopted the ordinary procedure. The sole point is whether it is a document of a mercantile character, so as to enable the plaintiff to avail himself of the summary mode of procedure provided by 18 & 19 Vict. c. 67. If it is not, the action fails. On the whole, and not without some doubt, I have come to the conclusion that the county court judge was right in holding that the document in question was not a promissory note. The Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), consists mainly of codification of the previously existing law. Sect. 83 defines certain qualifications which are admissible, and are not inconsistent with the fact of an instrument being a promissory note. I think it is safer to take the provisions of sub-s. 3, by which "A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof," as importing that, if the document contains something more than is there referred to, it would not be valid as a promissory note. I think therefore that this document is not a promissory note, within the meaning of the Act, and the appeal must be dismissed.

WRIGHT J. I agree. I think this document does not come within the Act, because it contains something more than can be contained in a promissory note.

Appeal dismissed; leave to appeal refused.

Solicitors for plaintiff: *Carthew & Wheeler, for Buckwell, Brighton.*

Solicitors for defendants: *Prior, Church & Adams.*

P. B. H.

1896
March 31.

REYNOLDS & CO. *v.* TOMLINSON AND ANOTHER.

Ship—Charterparty—"Safe Port"—Ship unable to reach Port without being Lightened—Evidence of Custom of Port.

A ship was chartered to proceed with a cargo of grain to a port of call "for orders to discharge at a safe port . . . . Discharge to be given with dispatch, according to the customs of the port of discharge, and to be all at one port . . . . Charterers to have the privilege of naming the discharging dock . . . . the dock to be one into which the vessel can at once safely enter and lie afloat at all times." She was ordered to discharge at Gloucester. The basin at Gloucester is approached by a canal seventeen miles long. On arrival of the ship at Sharpness, which is at the entrance to the canal, she was found to be of too great a draught to proceed up the canal. The charterers requested the master to discharge a sufficient part of the cargo at Sharpness to allow of her navigating the canal, and to proceed to Gloucester with the remainder. The master refused to do so, and discharged the whole at Sharpness. Gloucester and Sharpness are for commercial purposes different ports. In an action by the charterers for breach of the charterparty:—

Held, that the port of Gloucester, being one which the vessel could not safely reach with a full cargo, was not a safe port within the meaning of the charterparty; and that evidence of a custom of the port for vessels carrying grain to be lightened at Sharpness to allow of their proceeding up the canal to Gloucester was inadmissible, as being inconsistent with the terms of the charterparty by which the discharge was to be "at a safe port."

Neilsen v. *Wait* (16 Q. B. D. 67) distinguished.

APPEAL from the county court of Gloucestershire.

By a charterparty made between the defendants, owners of the ship *Autofagasta* (1), and the plaintiffs, charterers, it was agreed that the said ship should load a cargo of wheat in bags at Portland, Oregon, and proceed to Queenstown, Falmouth, or Plymouth, to call "for orders to discharge at a safe port in the United Kingdom . . . . Discharge to be given with dispatch according to the customs of the port of discharge, and to be all at one port . . . . Charterers' agents to have the privilege of naming the discharging dock, provided they avail themselves of

(1) *Sic* in the papers in the cause. There is however no such known name. There is a well known port called Antofagasta on the coast of Chile.—J. F. C.

the same within twenty-four hours after the arrival of the vessel is notified to them by the master or his agents, and the dock to be one into which the vessel can at once safely enter and lie afloat at all times." The *Autofagasta* having loaded a cargo of 1069 tons of wheat in bags at Portland, arrived at Falmouth where she received orders to discharge at Gloucester. The town of Gloucester and the Gloucester basin are approached by a canal seventeen miles long. On the arrival of the ship at Sharpness, which is at the entrance to the canal, the master asked for instructions as to the particular dock in which he was to discharge. He was ordered to discharge in the old dock in the Gloucester basin. The ship with her cargo on board was drawing 18 ft., whereas the depth of the canal was sufficient only to accommodate ships drawing not more than 14 ft. aft and 13 ft. 6 in. forward. In order to get up the canal to the Gloucester Basin the *Autofagasta* would have had to discharge at Sharpness 465 tons out of the total cargo of 1069 tons. The plaintiffs required the master to lighten the ship to that extent at Sharpness, and to proceed up to Gloucester with the remaining 604 tons. The master refused to do so on the ground that by the terms of the charterparty he could not be required to discharge his cargo at more than one port; and he accordingly discharged the whole cargo into lighters at Sharpness. The plaintiffs objected to the discharge of the 604 tons at that place, and took delivery there under protest. The excess cost of the discharge of the 604 tons into lighters over and above what it would have cost to discharge that amount at the dock quay at Gloucester, together with certain incidental expenses caused by having to take delivery at Sharpness, amounted to a sum of 50*l.*, for which sum the plaintiffs sued the defendants in the county court as damages for breach of the charterparty. At the hearing the judge admitted evidence of a custom at the port of Gloucester according to which ships employed in the grain trade, if of too great a draught to navigate the canal, were invariably lightened by the discharge of part of their cargo at Sharpness, and then proceeded up to Gloucester with the remainder. He found that custom to be proved. He also found as a fact that though for fiscal purposes Sharpness is in the

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port of Gloucester, in a commercial sense Gloucester and Sharpness are distinct ports. For the defendants it was contended that the custom could not override the express terms of the charterparty whereby the discharge of the cargo was to be "all at one port," and that the right of the charterers to select the dock was subject to the condition that it must be one which the ship can "at once safely enter," which condition the old dock at Gloucester did not satisfy. The judge, however, held that as by the charterparty "the discharge" was to be "according to the customs of the port of discharge," the provisions of the charterparty upon which the defendants relied must be read subject to the custom as to lightening at Sharpness. He accordingly held that in not carrying the 604 tons up to Gloucester the defendants had committed a breach of that contract, and he gave judgment for the plaintiffs for the amount claimed. The defendants appealed.

Boyd, for the defendants. By the terms of the charterparty the master was only bound to discharge at a safe port. The port of Gloucester was not a safe port for a vessel of the draught of the *Autofagasta* when she had her full cargo on board. A safe port means one at which the ship in question can safely lie afloat when loaded. A port is not safe if the ship cannot enter into it without first discharging part of her cargo outside: *The Alhambra* (1); or cannot safely get away with a full cargo: *Shield* v. *Wilkins*. (2) The Scottish case of *Hillstrom* v. *Gibson* (3) to the contrary is not binding. Secondly, the evidence of the custom to lighten ships at Sharpness was inadmissible, for it is inconsistent with the express language of the charterparty: *The Alhambra*. (1) In the case of *Neilsen* v. *Wait* (4) it was indeed held by the Court of Appeal that the custom of the port of Gloucester, which was relied on in the present case, namely, to lighten grain ships at Sharpness to allow of their getting up the canal, was a reasonable custom. There the ship discharged part of her cargo at Sharpness, and proceeded up to

(1) 6 P. D. 68.
(2) 5 Ex. 304.
(3) 8 Court Sess. Cas. 3rd Series, 463.
(4) 16 Q. B. D. 67.

Gloucester, where she discharged the remainder; and the only question argued was whether in the computation of the lay-days for the purposes of a claim for demurrage the period occupied by the passage of the ship up the canal was to be deducted. It was held that it was. But that case did not decide that the custom was consistent with a provision in a charterparty that the ship should only be required to go to a safe port. That question was not there discussed.

Brynmôr Jones, *Q.C.*, and *Lauriston Batten*, for the plaintiffs. The question is concluded by *Neilsen* v. *Wait* (1), where the Court held the custom to be not inconsistent with a charterparty which was in the same terms as that in the present case, and provided that the port of discharge should be one at which the ship could lie afloat at all times of the tide. *The Alhambra* (2) is distinguishable; for there the ship was required to discharge part of her cargo in an open roadstead not forming part of any port. That was an unreasonable requirement. But the master is bound to adopt and use all reasonable means to reach the port named: per Lush J., *Capper* v. *Wallace*. (3) Here the custom was not inconsistent with the charterparty, for it was expressly provided that the discharge was to be according to the customs of the port.

DAY J. I am of opinion that this appeal should be allowed. The charterparty provides that the port to which the ship is ordered to go must be a safe port. The port to which she was in fact ordered to go was Gloucester, and that was in my opinion not a safe port for this ship, for she could not get safely there with her cargo. She drew far too much to get beyond Sharpness with all her cargo on board. Sharpness is, no doubt, in one sense part of the port of Gloucester; but the county court judge has found that in a commercial sense, and, therefore, for the purposes of this charterparty, Sharpness and Gloucester are distinct ports. If, at the time when he received his orders at Falmouth to go to Gloucester, the master had been acquainted with the nature of that port, he would have been perfectly entitled to refuse to go there. But he did in fact go as far as

(1) 16 Q. B. D. 67. (2) 6 P. D. 68. (3) 5 Q. B. D. 163.

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Sharpness, and then, finding that he could not get up the canal with a full cargo, he discharged the whole at Sharpness. Then this action was brought to recover damages for the loss sustained by reason of the master's refusal to discharge part of his cargo at Sharpness and proceed with the rest up to Gloucester. The question is whether he was bound to do so. I think not. He had got as near to Gloucester as he could safely get, and was entitled to call on the consignees to take delivery at Sharpness. One case which was cited before us, that of *Neilsen* v. *Wait* (1), was decided with reference to this very custom of the port of Gloucester, and in connection with a charterparty containing terms almost undistinguishable from those of the charterparty in the present case. I say almost undistinguishable, because there was this distinction, that there did not appear to be any provision there, as there was here, that the discharge was to be all at one port. But I do not lay any stress on that distinction. In that case the ship was ordered to Gloucester, and the master, having got to Sharpness, unloaded part of the cargo and then went up to Gloucester, where he discharged the rest. The action was for demurrage, and the question for the Court was as to the number of days the plaintiffs were entitled to charge. The charterparty provided that the lay-days should be running-days, and the plaintiffs contended that the lay-days continued to run while the ship was passing up the canal in the interval between the two discharges of cargo. For the defendants evidence was given of a custom of the port that grain ships, if of too heavy a burthen to enter the canal, should lighten at Sharpness, and that the period of their passage up the canal after such lightening should not be included in the computation of the lay-days. The Court held that custom to be reasonable and not inconsistent with the provision that the lay-days should be running-days. The question whether Gloucester was or was not a safe port under such circumstances was never considered. The point was not taken. I cannot, therefore, regard that case as any authority upon the question which we have to decide. That question is, in my judgment, concluded by the decision in *The Alhambra*. (2) There a master, whose ship was chartered

(1) 16 Q. B. D. 67. (2) 6 P. D. 68.

to go to a safe port in the United Kingdom, was ordered to go to Lowestoft. It was found that the vessel drew too much water to allow of his getting into the harbour. He refused to lighten the ship in Lowestoft Roads as requested, and went on to Harwich, where he discharged. The Court held that he was justified in so doing on the ground that Lowestoft was not a safe port, and that evidence of a custom to lighten ships in the roads before going into the harbour was inadmissible as being inconsistent with the provision of the charterparty that the port of discharge should be a safe port. That case seems exactly to cover the present. The decision of the county court judge here was in my opinion wrong, and must be reversed.

LAWRANCE J. I am of the same opinion. In my judgment the case is undistinguishable from that of *The Alhambra*. (1) Whether *The Alhambra* (1) is distinguishable from *Neilsen* v. *Wait* (2), I do not say. But whether it is or not, I prefer to follow the former.

Appeal allowed.

Solicitors for plaintiffs: *Taynton, Sons & Siveter, Gloucester.*

Solicitors for defendants: *Weightman, Pedder & Weightman, Liverpool.*

(1) 6 P. D. 68.

(2) 16 Q. B. D. 67.

J. F. C.

1896
March 2.

CLEGG, PARKINSON & CO. *v.* EARBY GAS COMPANY.

Gasworks—Statutory Duty—Breach—Remedy—Whether Action lies—Supply of Gas—Gasworks Clauses Act, 1871 (34 & 35 *Vict. c.* 41), *ss.* 11, 12, 36.

An action will not lie against a gas company, to which the provisions of the Gasworks Clauses Act, 1871, apply, for damages sustained by a consumer by reason of their failure to give him a supply of gas sufficient in amount and in purity to satisfy the requirements of the Act. The consumer's only remedy is to proceed for penalties under s. 36 of the Act.

APPEAL of the plaintiffs from the decision of the judge of the county court of Yorkshire, holden at Skipton.

The plaintiffs claimed 50*l.* damages from the defendants for breach of contract to supply gas continuously as required by the plaintiffs, and in accordance with the Earby and Thornton Gas Order, 1894, alleging that on certain days no gas had been supplied, and on other days only a deficient and impure supply at less than the prescribed pressure had been given. Alternatively, the plaintiffs claimed damages for breach of the defendants' statutory duties under the Earby and Thornton Gas Order, 1894, and the Act confirming the same, and under the Gasworks Clauses Acts.

The plaintiffs had taken and paid for a supply of gas from the defendants, but there was no written or express contract between them. The defendants' powers were under the Earby and Thornton Gas Order, 1894, which was confirmed by 57 & 58 Vict. c. cxvii. The Order incorporated the provisions of the Gasworks Clauses Act, 1871. (1)

(1) The Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 11: "The undertakers shall, upon being required so to do by the owner or occupier of any premises . . . . give and continue to give a supply of gas for such premises, under such pressure in the main as may be prescribed."

Sect. 12: "The quality of the gas supplied by the undertakers shall, with respect to its illuminating power, be such as to produce at the testing place provided in conformity with this Act a light equal in intensity to that produced by the prescribed number of sperm candles of six in the pound, and such gas shall as to its purity not exhibit any trace of sulphuretted hydrogen when tested. . . . ."

Sect. 36: "Whenever the undertakers neglect or refuse to give a supply of gas to any owner or occupier

The county court judge found that the plaintiffs had sustained damage to the amount of 50*l.* by reason of the supply of gas having been insufficient and impure; but he held that the action was not maintainable, and gave judgment for the defendants. The plaintiffs appealed.

R. M. Bray (*T. T. Paine* with him), for the plaintiffs. An action for damages will lie against the defendant company. Under the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41) (1), there is a statutory obligation to give a sufficient supply of pure gas at the prescribed pressure. When the company does supply gas to an individual and is paid for that supply, the obligation of the company is the same as if there were an express contract to supply sufficient pure gas, and, if through breach of that obligation the individual suffers damage, an action will lie. The penalties imposed by s. 36 of the Act are no sufficient remedy for the loss suffered by the consumer. The case of *Atkinson* v. *Newcastle Waterworks Co.* (2), which was relied on by the county court judge, is quite different from this case, for there the breach was of a public duty to provide a public supply of water. Here there was a private supply of gas for private payment. From the fact of there being a private supply and payment, there ought to be inferred a contract to supply sufficient pure gas during the time for which

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of premises within the limits of the special Act entitled to the same, under such pressure as is prescribed, they shall be liable to a penalty not exceeding forty shillings for each day during which such default continues.

"Whenever the undertakers neglect or refuse to supply gas as by this Act required to all or any of the public lamps in accordance with the provisions of this Act, they shall be liable to a penalty not exceeding forty shillings for each default.

"If it shall be proved to the satisfaction of any two justices, not being shareholders in the undertaking, after hearing the parties, that on any day the gas supplied by the undertakers is under less pressure, of less illuminating power, or of less purity than it ought to be according to the provisions of this or the special Act, the undertakers shall in every such case forfeit and pay to the local authority or other persons making application for testing the gas such sum not exceeding twenty pounds as the justices shall determine."

(1) Ante, p. 592.

(2) 2 Ex. D. 441.

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payment is made. In *Hoddesdon Gas Co.* v. *Haselwood* (1) it was only decided that there is no implied contract by a gas company to continue the supply of gas. The general rule, which applies in this case, is that, if there is a breach of a statutory duty resulting in loss to an individual, an action lies: *Couch* v. *Steel.* (2)

[They referred to *Milnes* v. *Mayor, &c., of Huddersfield.* (3)]

C. A. Russell, for the respondents. There was no evidence of any contract between the plaintiffs and the defendant company. The defendants supplied gas under their statutory duties and powers. If the company does not properly perform its statutory duties, it is liable to the penalties imposed by the Act; there is no other liability. If an action would lie against a gas company by every consumer who was aggrieved, there would be an overwhelming liability upon such companies.

R. Bray, replied.

WILLS J. This question is of great importance, but is free from difficulty. The question is as to the supply of gas by a company which is regulated by statute. These statutes have been in force for many years, and it is very significant that there is no case to be found of a successful action of this kind. In my opinion this is one of those cases in which the principle applies, that, where a duty is created by statute which affects the public as the public, the proper remedy if the duty is not performed is to indict or take the proceedings provided by the statute. When large numbers of people are supplied with gas, the undertakers might speedily be ruined if any one could bring an action of this kind against them. It seems to me that, upon the above principle, an action of this kind cannot be maintained. This is not the same case as *Atkinson* v. *Newcastle Waterworks Co.* (4) or *Milnes* v. *Mayor, &c., of Huddersfield* (3); but I think that the action fails upon a principle deeper than that on which those cases were decided, that is, that where there is an obligation created by statute to do something for the benefit of the public generally or of such a

(1) 6 C. B. (N.S.) 239.
(2) 3 E. & B. 402.
(3) 11 App. Cas. 511.
(4) 2 Ex. D. 441.

large body of persons that they can only be dealt with practically, en masse, as it were, and where the failure to comply with the statutory obligation is liable to affect all such persons in the like manner, though not necessarily in the same degree; there is no separate right of action to every person injured, by breach of the obligation, in no other manner than the rest of the public. Commonly such statutes provide specific remedies, as in the *Newcastle Waterworks Case* (1) and in the present case, but not always. For instance, there is no specific remedy provided for breach of the obligation cast upon an urban local authority to provide an efficient system of sewerage; but no action can be maintained by a person who suffers only as one of the public by the breach of such an obligation. The appeal must be dismissed.

WRIGHT J. The obligation of the company, if any, depends upon statute and not upon contract. The general rule of law is that, where a general obligation is created by statute and a specific remedy is provided, that statutory remedy is the only remedy. That principle is laid down in *Doe* v. *Bridges* (2), *Stevens* v. *Jeacocke* (3), *Marshall* v. *Nicholls* (4), and other cases. Here a specific remedy is given by statute, and I think that is the only remedy. I am not sure that there is here any absolute obligation to supply at all. At any rate, there is no contractual obligation. I doubt very much whether any action for a nuisance would lie in such a case as this; the plaintiffs have themselves brought the gas upon their premises. The appeal, therefore, fails.

Appeal dismissed; leave to appeal.

Solicitors for plaintiffs: *Turner, Smith & Co., for W. A. Robinson, Keighley.*

Solicitors for defendants: *Littledale & Lefroy, for Artindale & Southern, Burnley.*

(1) 2 Ex. D. 441.
(2) 1 B. & Ad. 847, 859.
(3) 11 Q. B. 731.
(4) 18 Q. B. 882.

W. A.

1896
Jan. 27;
March 28.

THE QUEEN *v.* HORACE SMITH.

Adulteration — Magistrate—Jurisdiction — Place where Offence committed — Analysis—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 20, 27.

An information was preferred in the Clerkenwell Police Court by an inspector of nuisances for the district, charging the defendant with having, contrary to s. 27 of the Sale of Food and Drugs Act, 1875, given a false warranty in writing with respect to milk sold and delivered by him to a dairy company. The sale, delivery, and giving of the warranty had all taken place outside the limits of the jurisdiction of the Clerkenwell Police Court; but the inspector had, with a view to a prosecution against the dairy company under s. 6, obtained a sample of the milk in the course of its delivery by them, within the jurisdiction of that Court, to purchasers from them, and had submitted the sample to the public analyst of the district, who certified that it contained a percentage of added water:—

Held, that a metropolitan police magistrate sitting at the Clerkenwell Police Court had no jurisdiction under the Sale of Food and Drugs Act, 1875, to hear and determine the information against the defendant.

RULE FOR A MANDAMUS.

The following statement of the nature of the proceedings before the Court, and of the facts, is taken from the judgment of Hawkins J. (1):—

This was a rule calling upon Horace Smith, Esq., one of the magistrates of the police courts of the metropolis sitting at the Clerkenwell Police Court, and David Kerr, a farmer, of Brook Farm, near Oakham, in Rutlandshire, to shew cause why the said magistrate should not proceed to hear and determine two informations preferred by Patrick Mernagh, an inspector of nuisances for the parish of St. Mary, Islington, against the said David Kerr, charging him for that he did, on June 14 and 26, 1895, respectively, give false warranties in respect of one churn of milk sold on each of those days by the said David Kerr to the Manor Farm Dairy, Limited, contrary to s. 27 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63).

Saving the dates, and that there was alleged to be less water added to the milk in the second case, the two cases are precisely

(1) Post, p. 600.

similar in the material facts. I have dealt, therefore, with the first in order of time only.

In June, 1895, a contract was in existence for the sale and delivery of milk by the Manor Farm Dairy, whose premises are at East Finchley, in Middlesex, to the committee of the Great Northern Central Hospital at their premises in the Holloway Road, in the parish of St. Mary, Islington. On June 15, Patrick Mernagh, an inspector of nuisances duly appointed for the said parish of St. Mary, Islington, procured at the said hospital premises, under the powers of s. 3 of the Food and Drugs Amendment Act, 1879(42 & 43 Vict. c. 30), at the place of delivery there, a sample of milk which was then in course of delivery under the said contract. That sample was duly submitted to the public analyst for the said parish for analysis, and he, on June 22, certified "that the said sample contained 14 per cent. of added water." Upon this certificate an information was preferred, under s. 6 of the Act of 1875, by the said inspector against the dairy company, charging that they had sold to the prejudice of the hospital committee, the purchasers, the said milk, the same not being of the nature, substance, and quality demanded by such purchasers, in that it was adulterated to the extent of 14 per cent. of added water. This information came on to be heard on July 8 by Mr. Bros, the then sitting magistrate at the police court, and on that hearing the dairy company proved to the satisfaction of the magistrate that they had purchased the milk as the same in nature, substance, and quality as that demanded of them, and with a written warranty to that effect; that they had no reason to believe at the time they sold it that it was otherwise, and that they sold it in the same state as when they purchased it. Upon this ground the prosecution against the dairy company was dismissed under s. 25 of the same Act. The said David Kerr was the vendor of the said milk to the dairy company. The churn containing it was sent by him from the Oakham Railway Station on June 14, addressed to the dairy company, with a label attached containing such a written warranty as above mentioned, and it was delivered to the dairy company at the railway station at East Finchley outside the parish of St. Mary, Islington, and also outside the district

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subject to the jurisdiction of the Clerkenwell Police Court. After the dismissal of the case against the dairy company, an information was preferred by the same inspector of nuisances against the said David Kerr under s. 27 of the Food and Drugs Act, 1875, charging him with giving a false warranty in writing to the dairy company in respect of the said churn of milk so sold and delivered by him to the dairy company. This information came on for hearing before Mr. Horace Smith, the sitting magistrate at the Clerkenwell Police Court, on July 20, but he declined to hear and determine it upon the ground that he had no jurisdiction so to do.

A. T. Toller, for the defendant Kerr, shewed cause against the rule. The magistrate was right in deciding that he had no jurisdiction to hear and determine the matter of these informations. The alleged offence of giving a false warranty was either commenced and completed at Oakham, or it was commenced there and completed at Finchley, both places being outside the limits of the jurisdiction of the Clerkenwell Police Court. Sect. 20 of the Sale of Food and Drugs Act, 1875 (1), does not

(1) The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63) :—

By s. 6, "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance and quality of the article demanded by such purchaser," under a penalty.

By s. 10, in all parts of the metropolis other than the City of London and the liberties thereof the vestries and district boards acting in execution of the Act for the better local management of the metropolis may, as soon as convenient after the passing of the Act, where no appointment has been hitherto made, and in all cases as and when vacancies in the office occur, shall "for their respective districts . . . . appoint one or more persons possessing competent knowledge, skill, and experience, as analysts of all articles of food and drugs sold within the said . . . . metropolitan districts."

By s. 12, "Any purchaser of an article of food or of a drug in any place being a district . . . . where there is any analyst appointed under this . . . . Act . . . . shall be entitled, on payment, &c., to have such article analyzed by such analyst, and to receive from him a certificate of the result of his analysis."

By s. 13, "any . . . . inspector of nuisances . . . . may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act, shall submit the same to be analyzed by the analyst of the district or place for which he acts, &c."

By s. 20, "When the analyst having analyzed any article shall have given his certificate of the result, from which it may appear that an offence against

apply; it only refers to offences under s. 6, and other previous sections. The public analyst can only act for the district for which he is appointed under s. 10, and his certificate is only evidence in respect of some offence committed within that district; it could not be given in evidence in the present case to prove an offence committed at Oakham or East Finchley. There is no need, where the offence charged is giving a false warranty under s. 27, that the sample should be divided into parts and an analysis taken under ss. 13 and 14. It cannot appear from the certificate that a false warranty has been given. Sect. 46, sub-s. 2, of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), provides that where an offence is begun within the jurisdiction of one Court and completed within the jurisdiction of another Court of summary jurisdiction, such offence may be tried by any one of such Courts. The offence here ought, therefore, to have been tried either at Oakham or East Finchley. [He also referred to *Reg.* v. *Titterton.* (1)]

A. Macmorran, for the prosecutor, supported the rule. The magistrate had jurisdiction. By s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, an inspector who takes a

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some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence, before any justices in petty sessions assembled having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner."

By s. 27, "Every person who shall give a false warranty in writing to any purchaser in respect of an article of food or a drug sold by him as principal or agent, shall be guilty of an offence under this Act, and be liable to a penalty," &c.

By s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879 (42 & 43 Vict. c. 30), "Any . . . . inspector of nuisances . . . . under the direction and at the cost of the local authority appointing such . . . . inspector . . . , or charged with the execution of this Act, may procure at the place of delivery any sample of any milk in course of delivery to the purchaser or consignee in pursuance of any contract for the sale to such purchaser or consignee of such milk; and such . . . . inspector . . . , if he suspect the same to have been sold contrary to any of the provisions of the principal Act, shall submit the same to be analyzed, and proceedings shall be taken, and penalties on conviction be enforced in like manner in all respects as if such . . . . inspector . . . . had purchased the same from the seller or consignor under s. 13 of the principal Act."

(1) [1895] 2 Q. B. 61.

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sample whilst the article is in course of delivery to a purchaser is placed in the same position as if he had himself bought the article and submitted it to analysis under s. 13 of the Act of 1875. Sect. 20 of the Act of 1875 enables proceedings to be taken where it appears from the certificate that an offence against some one of the provisions of the Act has been committed. It appeared in the present case that an offence either under s. 6 or under s. 27 had been committed, and the only person who, under s. 20, can take proceedings for the penalty is "the person causing the analysis to be made." Such proceedings are to be taken "before any justices in petty sessions assembled having jurisdiction in the place where the article or drug was actually delivered to the purchaser." It is submitted that s. 20 enabled the inspector to take proceedings before the magistrate in the Clerkenwell Police Court, the delivery to the hospital having taken place within the jurisdiction of that Court. There may be an analysis taken of milk without a division of the sample into parts under s. 14: *Rouch* v. *Hall* (1); *Rolfe* v. *Thompson*. (2)

Cur. adv. vult.

March 28. The following judgment was read by

HAWKINS J. This matter was argued before myself and my brother Kennedy, who has read the judgment I am about to pronounce, and authorizes me to say that he entirely concurs in it. [The learned judge here stated the facts as previously set out.] It is beyond doubt that in fact neither the sale, nor the warranty, nor the delivery to the dairy company, was made within the limits of the jurisdiction of the Clerkenwell Police Court, and it was not suggested that any sample was taken of the milk at the place or during the course of delivery to the dairy company. Unless some enactment can be found altering the general rule of law that an offence must be prosecuted before a tribunal having jurisdiction to entertain it within the county or place in which it has been committed, the magistrate at the Clerkenwell Police Court had no jurisdiction over it. It is said, however, that such an enactment is to be found in s. 20 of the Act of

(1) 6 Q. B. D. 17. (2) [1892] 2 Q. B. 196.

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Hawkins J.

1875. We are not of that opinion. Before I discuss that enactment, I desire to point out one or two matters essential to be borne in mind—namely, the offence charged against the dairy company was of a totally different character from that preferred against Kerr; that against the dairy company was framed under s. 6 of the Act of 1875 for selling to the prejudice of the hospital committee milk which was not of the nature, substance, and quality of the article demanded by the purchasers. Under the circumstances stated no such offence could possibly be charged against Kerr, for he neither sold or delivered any milk to the hospital committee. The information against Kerr was framed under s. 27 of the same Act for giving a false warranty in writing to his purchasers, the dairy company, in respect of the milk sold by him to them. Let me now call attention to the words of s. 20 of the Act of 1875: "When the analyst, having analyzed any article, shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence, before any justices in petty sessions assembled having jurisdiction in the place where an article or drug sold was actually delivered to the purchaser"—(I think that this part of the Act must be read as if the words "or the sample of milk was procured as mentioned in section 3 of the Act of 1879" were inserted here)—"in a summary manner." It has been held that the certificate of the analyst is a condition precedent to a prosecution under this section (see *Peart* v. *Barstow* (1); *Smart & Son* v. *Watts* (2)), and it seems to me not open to question that the words "When the analyst, having analyzed any article," at the commencement of the section, must be interpreted to mean the official analyst appointed under s. 10 as analyst of all food and drugs sold within the district for which he is appointed, and the inspector of nuisances appointed for any district or place can only require the analyst, if there be one, for that district to analyze the suspected samples and give his certificate under s. 13. We take it,

(1) 44 J. P. 699. (2) [1895] 1 Q. B. 219.

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therefore, that an inspector of nuisances could neither insist upon procuring a sample in a district for which he is not appointed, nor could an analyst not appointed to act for such district give any valid and effectual certificate of the result of his analysis under s. 13. Sect. 18, which, with reference to the schedule to the Act, prescribes the form of the certificate, evidently contemplates an analysis by the local analyst of the article analyzed as it is at the time it is delivered to him. Then comes s. 20 under discussion, and, immediately following, s. 21, which enacts that at the hearing of the information in such proceeding—i.e., the proceedings mentioned in s. 20—the production of the certificate of the analysis shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness. All these provisions point, in our opinion, to the intention of the Legislature to provide for local inspectors with power to obtain by local analysts analyses of questionable samples of articles of food or drugs sold within their districts, and to provide for the prosecution of offenders against the Act before justices of the peace having jurisdiction in the place where adulterated goods are actually delivered to the purchasers; but it never could have been in the contemplation of the Legislature to give justices jurisdiction to deal with persons offending against the Acts in other parts of the United Kingdom out of their jurisdiction. There are certainly no words expressive of such an intention to be found in s. 20 or in any other section of the Acts either of 1875 or 1879. In this case no act tending to establish a violation by Kerr of the statutes I have discussed occurred within the jurisdiction of the Clerkenwell Police Court. The warranty was made at Oakham, the delivery by Kerr to the dairy company at Finchley. There was no sample of the milk taken by any inspector in the course of its delivery to the dairy company, and therefore there could be no "such" sample to analyze, and, even had there been, no analysis was made by any analyst appointed for the district of Finchley, and the analysis of a sample taken after the milk had been actually delivered to and received by the dairy company in a district where Kerr never had any control over the milk, and of which

he had no knowledge, could not affect him, and the certificate given as the result of the analysis of "such" a sample could not, in our opinion, be any evidence as against Kerr. Moreover, though the certificate may have been evidence as against the dairy company that the sample taken in St. Mary's, Islington, while in course of delivery by them to the hospital, was adulterated, there was nothing on it from which it appeared that the offence of giving a false warranty was committed by the defendant Kerr at Oakham or anywhere else. Under all these circumstances, we are at a loss to see any ground for the contention that the Clerkenwell magistrate had any jurisdiction over the information against Kerr. It is only for "such" offence as appears by the certificate that any prosecution can be instituted under s. 20. The rule must, therefore, be discharged.

The learned judge added: I wish before concluding to observe, with regard to the form of the certificate, that the analyst's duty is merely to analyze and report the result of the analysis, and he has no right, as I think, to report extraneous facts unconnected with the analysis; and if he does so his certificate would, in my judgment, be inadmissible as evidence of such facts. In so far as it states in due form the result of the analysis, the certificate is sufficient for the justices to act upon, unless the defendant requires the analyst to be called as a witness, or unless other evidence is adduced before the justices which induces them to come to the conclusion that it is incorrect. The expression used by me in my judgment in *Fortune* v. *Hanson* (1) that the certificate is "practically conclusive" was intended only to convey the impression I entertained that in the vast majority of cases brought before justices no other evidence was offered of the impurity of the article, and to point out the great importance of insisting upon its containing all the material details of the analysis to enable the justices themselves to form a judgment on the question before them. Had I intended to do more I should have qualified my expression by what I have now stated. I may say also that the analyst's certificate here was very much like the certificate

(1) Ante, 202, at p. 205.

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in *Fortune* v. *Hanson* (1), and, though it is not necessary to consider the question in this case, might probably have been objected to on the same ground.

Rule discharged.

Solicitor for prosecutor: *Stanley Hoare.*
Solicitor for defendant: *P. G. Robinson.*

W. A.

1896
April 17.

REYNOLDS *v.* THE URBAN DISTRICT COUNCIL OF PRESTEIGN.

Local Government—Local Authority—Powers—Highway—Removal of Obstructions—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26.

An urban district council has power to remove encroachments upon any highway vested in it by s. 149 of the Public Health Act, 1875, without first taking proceedings, summarily or by indictment, against the person alleged to have encroached.

APPEAL from the judgment of the judge of the Presteign County Court, given after the trial of an action with a jury.

The action was brought in the county court for damages and an injunction in respect of trespasses alleged to have been committed by the defendant urban district council on land belonging to the plaintiff.

The following facts appeared from the evidence given at the trial: In 1878 the plaintiff purchased property consisting of a cottage and garden in the parish of Presteign within the defendants' district, and bounded on three sides by highways—one being a main highway, and the other two lanes about 9 ft. wide. In 1895 the defendants complained that the plaintiff had encroached upon and obstructed the three highways. On January 5 in that year they gave the plaintiff notice of encroachments and obstructions under s. 65 of 5 & 6 Will. 4, c. 50 (the Highway Act, 1835), and on March 4 they gave him notice under s. 160 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), and s. 69 of the Towns Improvement Clauses Act, 1847

(1) Ante, 202.

(10 & 11 Vict. c. 34 (1)), to remove the alleged obstructions and encroachments. In April, the plaintiff not having complied, as was alleged, with the last-mentioned notice, the defendants did the acts complained of in the plaintiff's particulars of claim, which were in substance—grubbing up certain holly and quick hedges, cutting certain other hedges, and removing certain post and wire railings, all of which belonged to the plaintiff. The alleged obstructions and encroachments had existed for a much longer period than six months before the action was brought, and no proceedings, either by indictment or summarily before justices, had at any time been taken by the defendants, or by the urban sanitary authority of Presteign whom they succeeded, in respect of such obstructions and encroachments. The defendants had given no notice of any special defence founded on s. 69 of the Towns Improvement Clauses Act, 1847.

At the close of the case the counsel engaged on either side agreed upon the questions to be left to the jury, who, in answer to those questions, found that the hedges cut, and the fences, posts, and wires removed by the defendants, were all encroachments on the highways.

The county court judge, after considering the questions of law raised, was of opinion that the defendants had no authority at common law to do what they did, and that, not having

(1) Sect. 69: "The commissioners may give notice to the occupier of any house or building to remove or alter any porch, shed, projecting window, step, cellar, cellar door or window, sign, signpost, sign-iron, showboard, window shutter, wall, gate, or fence, or any other obstruction or projection erected or placed, after the passing of the special Act, against or in front of any house or building within the limits of the special Act, and which is an obstruction to the safe and convenient passage along any street; and such occupier shall, within fourteen days after the service of such notice upon him, remove such obstruction, or alter the same in such manner as shall have been directed by the commissioners, and in default thereof shall be liable to a penalty not exceeding forty shillings; and the commissioners in such a case may remove such obstruction or projection, and the expense of such removal shall be paid by the occupier so making default, and shall be recoverable as damages."

By s. 160 of the Public Health Act, 1875, the provisions of the Towns Improvement Clauses Act, 1847, "with respect (inter alia) to improving the line of the streets and removing obstructions, shall, for the purpose of regulating such matters in urban districts, be incorporated with this Act."

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complied with Order x., r. 18a, of the County Court Rules, 1889, by pleading specially their statutory defence, they were not in a position to raise their supposed statutory right. He was also of opinion that, as to all the acts complained of, the defendants were not supported by the Towns Improvement Clauses Act, 1847, s. 69, inasmuch as they acted without having first obtained a summary conviction against the plaintiff, and that some of those acts did not come within the statute. He therefore entered judgment for the plaintiff for damages, agreed at 5*l*.

The defendants appealed from this decision.

W. D. Benson, for the defendants. The defendants were entitled to abate the nuisance caused by the encroachments on the highways without having first taken proceedings before justices. No doubt if the local authority in whom the highways are vested prostrate encroachments without taking proceedings before justices they do it at their own peril, and run the risk of being made liable in damages in an action for trespass; whilst if they take proceedings, and obtain a decision of justices in their favour, they have an answer to such an action: *Keane* v. *Reynolds* (1), per Lord Campbell C.J.; *Turner* v. *Ringwood Highway Board* (2); *Bagshaw* v. *Buxton Local Board of Health* (3), per Jessel M.R. By the Local Government Act, 1894, s. 26, sub-s. 1, an express duty is cast upon every district council to protect all public rights of way, and to prevent the stopping or obstruction thereof. Sect. 69 of the Towns Improvement Clauses Act, 1847, justifies the local authority in removing obstructions to streets after notice and on default in compliance with the notice, and, on the true construction of that section, it is not necessary to obtain a conviction first. [He was stopped.]

Corner (*A. Bertram* with him), for the plaintiff. The defendants had no power except that given them by statute. A private individual cannot remove an encroachment upon a highway unless he is specially injured thereby: *Bagshaw* v. *Buxton Local Board of Health* (3), per Jessel M.R.; *Dimes* v.

(1) 2 E. & B. 748, at p. 749. (2) L. R. 9 Eq. 418.
(3) 1 Ch. D. 220, at p. 223, 224.

Petley (1); *Bateman* v. *Bluck* (2); and the defendants, unless they can shew additional statutory powers, are in the same position. They must take proceedings and obtain a judicial decision that what is complained of is an encroachment before they can exercise their statutory power to remove it; they ought not to decide the question for themselves. The person who is alleged to have encroached is entitled to be heard or to have an opportunity of being heard: *Cooper* v. *Board of Works for the Wandsworth District* (3); *Hopkins* v. *Smethwick Local Board of Health.* (4) Sect. 69 of the Towns Improvement Clauses Act, 1847, has no application to this case; it only applies to obstructions placed in front of houses.

[LORD RUSSELL of KILLOWEN C.J. Sect. 149 of the Public Health Act, 1875, and s. 26 of the Local Government Act, 1894, seem to be strongly in the defendants' favour. (5)]

Under s. 149 streets only vest in the urban authority in the limited sense pointed out in *Coverdale* v. *Charlton.* (6) The defendants should have specially pleaded the statutory defence under s. 69 of the Towns Improvement Clauses Act, 1847, if they intended to rely on that defence.

LORD RUSSELL of KILLOWEN C.J. I am of opinion that this appeal should be allowed, and I wish to make clear the data upon which my judgment rests. The plaintiff is complaining

(1) 15 Q. B. 276.

(2) 21 L. J. (Q.B.) 406.

(3) 32 L. J. (C.P.) 185.

(4) 24 Q. B. D. 712.

(5) The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 149: "All streets, being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements stones and other materials thereof, and all buildings implements and other things provided for the purposes thereof, shall vest in and be under the control of the urban authority."

By s. 4, "'Street' includes any highway, not being a turnpike road."

The Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 26, sub-s. 1: "It shall be the duty of every district council to protect all public rights of way, and to prevent as far as possible the stopping or obstruction of any such right of way, whether within their district or in an adjoining district in the county or counties in which the district is situate, where the stoppage or obstruction thereof would in their opinion be prejudicial to the interests of their district, and to prevent any unlawful encroachment on any roadside waste within their district."

By s. 21, urban district councils are substituted for urban sanitary authorities.

(6) 4 Q. B. D. 104.

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Lord Russell C.J.

of certain acts done by the defendants, which he alleges were acts of trespass to his property. The defendants' answer is, "We have committed no trespass: what we did was to remove encroachments which you had caused to be placed on certain public highways within our district, we being the urban district council of Presteign." It is common ground that the questions left to the jury excluded the supposition that there was any allegation of excess by the defendants beyond what was necessary to remove the encroachments, and that those questions were only with respect to the fact of encroachment. The first thing to be noted is that it must be taken as a datum that each one of these highways was a highway repairable by the inhabitants at large. Originally, no doubt, they were highways under the control of some local highway authority; but it would appear that up to the passing of the Public Health Act, 1875, there was no statutory provision which vested the soil and property in such highways in any public body. The soil and property were supposed to belong, ad medium filum, to the adjoining owners, and the highway authority had a supervisory and protective power only. By s. 149 of the Act of 1875, which applies here, all streets, being or which at any time become highways repairable by the inhabitants at large within any urban district, and the pavements, stones, and other materials thereof shall vest in and be under the control of the urban authority. The present defendants have succeeded to the position and powers of the urban authority under the Local Government Act, 1894, and by s. 26, sub-s. 1, of that Act, the duty is imposed upon them of protecting all public rights of way, and of preventing, as far as possible, the stopping or obstruction of any such right of way, whether within their district or in an adjoining district in the county or counties in which the district is situate, where the stoppage or obstruction thereof would in their opinion be prejudicial to the interests of their district, and of preventing any unlawful encroachment on any roadside waste within their district. I do not at all mean to dissent from some of the observations which were made by counsel for the plaintiff, pointing out that it is desirable that the question whether a private individual has encroached should

not be decided by the public body acting in a high-handed way, or taking the law into their own hands. Where the question is one of doubt or difficulty, I think a judicial decision should be obtained by the public authority. If they proceed to act, professing to prostrate the encroachment under the powers of the statute, without having obtained such a decision, they run a considerable risk. The burden lies upon them of justifying their action; and, if they fail to justify by reason of their being unable to shew that there was an obstruction or encroachment, they become liable to damages for trespass. I think, however, that if they are able to shew that there is an obstruction or encroachment, they have the same right as a private individual has to protect his own property. Where there is an encroachment on or obstruction to private property, the owner is entitled to remove it. As regards the cutting of trees, the House of Lords, in the recent case of *Lemmon* v. *Webb* (1), held that it was not even necessary to give notice to the owner of trees overhanging the land of an adjoining owner before the latter cut the branches which overhung. With respect to encroachments on or obstructions to highways, it is undoubtedly true that there are statutory provisions pointing out particular means which the local authority may adopt in order to obtain the removal of the encroachment or obstruction; but, in my opinion, those provisions are not intended to be exclusive. They are provisions not necessary but supplementary to the right to remove—provisions to which the local authority can resort if they so desire. I therefore come to the conclusion, having regard to the findings of the jury in this case, that the defendants did no more than they were justified in doing. It is unnecessary for me to refer to s. 69 of the Towns Improvement Clauses Act, 1847. I do not base my judgment on that section, and I do not decide whether it was necessary for the defendants to plead it specially in the county court. I am of opinion that judgment should be entered for the defendants.

WRIGHT J. I am of the same opinion. I will only add that, while agreeing entirely that as a general rule it is better that

(1) [1895] A. C. 1.

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the local authority should obtain a decision before removing an encroachment, I doubt very much whether they could have done so here. I am not sure that all of those fences could have been made the subject of an indictment; and as to summary proceedings, the period—six months—within which they could have been taken, had expired. It is, therefore, not clear that the defendants could have done anything but what they did—that is, take the matter into their own hands.

Judgment for the defendants.

Solicitors for plaintiff: *Meredith, Roberts & Mills, for Wallis, Hereford.*

Solicitors for defendants: *Norris, Allens & Chapman, for Clifford Jones, Presteign.*

W. A.

C. A.

1896

April 20.

[IN THE COURT OF APPEAL.]

HOOD BARRS *v.* HERIOT.

Practice—Costs—Solicitor—Reversal of Judgment—Repayment of Costs.

A solicitor who has demanded and received payment of costs payable to his client under an order of the Court, with knowledge that an appeal against that order was pending, cannot on its reversal be ordered personally to repay the costs so paid to him in the absence of any misconduct or undertaking to do so on his part.

APPLICATION that certain solicitors, who were the London agents of the defendant's country solicitor, should be ordered to repay to the applicant, Hood Barrs, the amount of the defendant's taxed costs of an appeal to the Court of Appeal in default of repayment of that amount by the defendant.

The facts were as follows. A judgment had been obtained against the defendant, a married woman, in an action by a milliner for goods sold and delivered. The defendant was under her marriage settlement entitled to the income of trust funds for life for her separate use, but without power of anticipation. An order was made by a judge at chambers, by way of execution upon the judgment, appointing a receiver of arrears of income

which had accrued due to the defendant at the date of the judgment, but had not been paid over to her by the trustees of the settlement. The defendant appealed against this order. Prior to the appeal Hood Barrs, to whom the plaintiff had assigned the judgment debt, had obtained an order that in all further proceedings he should be substituted for the original plaintiff. The Court of Appeal allowed the appeal with costs. (1) A petition of appeal against their decision to the House of Lords was thereupon lodged by Hood Barrs, and an application was made by him to the Court of Appeal for a stay of execution upon their order, which however was refused. The defendant's costs of the appeal to the Court of Appeal having been taxed, the London agents of the defendant's country solicitor demanded payment of the amount found to be due on taxation from Hood Barrs. He offered to pay the amount upon their giving an undertaking to repay it if his appeal to the House of Lords were successful. They refused to give such an undertaking, and threatened to issue execution against him, whereupon he paid them the amount of the costs.

It appeared from the affidavits that they, with the consent of the defendant's country solicitor, applied the amount so paid to them towards payment of an amount to which he was then indebted to them in their cash account with him; and that, the defendant being then indebted to him in a sum exceeding the amount so paid, he, with her consent, applied that amount to the credit of her account with him; and that he subsequently at her request rendered to her his bill of costs, together with a cash account which shewed, after giving credit for the amount so paid, a balance against her. Upon the case coming before the House of Lords they reversed the order of the Court of Appeal, and gave judgment for Hood Barrs with costs. (2) Application was thereupon made on his behalf as above mentioned.

Oswald, Q.C., and *Bartley Denniss*, for Hood Barrs. It is contended that, where a solicitor has demanded and received payment of costs with knowledge that an appeal on substantial

(1) See *Loftus* v. *Heriot*, [1895] 2 Q. B. 212. (2) [1896] A. C. 174.

C. A. 1896

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grounds was pending, and it can be shewn that the amount so paid really remains in his hands and has never been paid to his client, as is the case here, the solicitor ought, in the event of the appeal succeeding, to be made responsible personally for the repayment of the amount. The Court of Appeal in Ireland, under circumstances similar to those which exist in the present case, have ordered repayment of costs by a solicitor: *Fitzmaurice* v. *Jordan*. (1)

Sylvain Mayer, for the solicitors. This Court has no jurisdiction to entertain the application. Assuming that there is any legal ground for such an application, it ought to have been made to the House of Lords. This Court has not now seisin of the case. The Irish case relied upon for the applicant shews that such an application as this must be made to the Court reversing the order under which the costs have been paid. Assuming that the Court has jurisdiction, there is no legal ground for the application. The decision in *Fitzmaurice* v. *Jordan* (1) does not represent the English practice, and there is no English authority for making such an order against a solicitor. On the contrary, in *Lydney and Wigpool Iron Ore Co.* v. *Bird* (2) Cotton L.J. expressed a strong opinion that such an order could not be made.

Oswald, Q.C., in reply. This Court, as being the Court under whose order the costs were paid, has, upon that order being reversed, original jurisdiction to order the solicitors as officers of the Court to repay the money so received by them. It is, moreover, common practice that the orders necessary for working out a judgment of the House of Lords are made by the Court below.

LORD ESHER M.R. This case having been taken on appeal from the decision of this Court to the House of Lords, I very much doubt whether, after that, we have any jurisdiction in the matter; but I do not think it is necessary for the purpose of dealing with this application to rely upon that, and I will deal with the application as if we had jurisdiction to entertain it. Upon the appeal to this Court it was ordered that the costs

(1) 32 L. R. Ir. 112.

(2) 33 Ch. D. 85.

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Lord Esher M.R.

of the appeal should be paid to the defendant. The amount of these costs having been ascertained by taxation was under that order paid to the London agents of the defendant's country solicitor. That amount was paid to them, not in their own right, but as agents for the defendant, and therefore the payment was really to the defendant through the hands of her solicitors. The application is not that the defendant should repay these costs, but that, in default of her doing so, the solicitors should be ordered themselves to repay them out of their own pockets. No such order ever appears to have been made in England. The counsel for the applicant said that we ought to disregard the statement made by the registrars in the case of *Lydney and Wigpool Iron Ore Co.* v. *Bird* (1); but I do not think we ought to do so, they being the persons who would in their official capacity know whether there was any precedent for such an order. No English authority was cited in favour of this application, and the observations made in that case by Cotton L.J., the authority of which is great, even though they may not amount to more than a dictum, are strong to shew that such an application could not be successful. The reasons which he gave for that view appear to me to be conclusive. The decision of the Court of Appeal in Ireland in the case of *Fitzmaurice* v. *Jordan* (2) has been cited to us in support of this application. That decision does appear to me to be in point, and, although it is not binding on us as an authority, we are bound to consider it with respect as being a decision on the subject by eminent judges. I have carefully read what was said in the judgment in that case, and I must say that it does not appear to me that the Court gave any satisfactory reason for making the order which they made. I must, therefore, decline to follow that case, and, on the grounds stated by Cotton L.J. in *Lydney and Wigpool Iron Ore Co.* v. *Bird* (3), I think this application ought to be refused.

A. L. SMITH L.J. I am of the same opinion. When the applicant's counsel stated the grounds upon which he applied,

(1) 33 Ch. D. 85, at p. 96. (2) 32 L. R. Ir. 112.
(3) 33 Ch. D. 85.

C. A. 1896

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A. L. Smith L.J.

it struck me that the application was such as I had never heard of before. It is an application that solicitors should be ordered to repay out of their own pockets money which they have received on account of their client in due course of law, although they have been guilty of no impropriety of conduct in the receipt of it, and have given no undertaking for its repayment.

The facts are these. The defendant having appealed to this Court against the order of a judge at chambers, the Court allowed the appeal with costs. The plaintiff, Mr. Hood Barrs, applied for a stay of execution, which was refused. The costs having been taxed, the solicitors acting on the defendant's behalf applied to Mr. Hood Barrs for payment of them. He declined to pay these costs unless they gave him an undertaking to repay them if the appeal which he was bringing to the House of Lords were successful. They declined to give such an undertaking, and threatened to issue execution against him. He then paid the costs. It is not disputed that the solicitors in what they did were only doing their duty to their client. When the case came before the House of Lords, it reversed the decision of this Court and ordered the defendant to pay the costs. Thereupon the present application is made against her solicitors to pay them personally. I feel grave doubt whether this Court has under the circumstances any jurisdiction at all to entertain it, but, passing that by and assuming that we have jurisdiction, I do not think that we can accede to the application. There appears to be no precedent for such an order as is asked for in this country. There is no doubt the decision of the Irish Court which the applicant's counsel cited in support of his contention, but that is not an authority binding upon us; and, on the other hand, there are the observations of Cotton L.J. in the case of *Lydney and Wigpool Iron Ore Co.* v. *Bird* (1), which, although they do not amount to an absolute decision on the point, are of high authority, and are exactly consonant with what I should, independently of them, have supposed to be the practice on the subject. I cannot see any legal ground upon which a solicitor,

(1) 33 Ch. D. 85.

who has in due course of law obtained for his client payment of costs, can be ordered himself personally to repay them in the absence of any misconduct on his part, or any undertaking by him to do so.

RIGBY L.J. I am of the same opinion. In this case the defendant appealed from an order made at chambers to this Court, and the appeal was allowed with costs. The respondent applied for a stay of execution, pending an appeal by him to the House of Lords; but that application was refused; and there was no order made that the solicitors for the defendant should enter into any undertaking for the repayment of costs, which in itself seems to me a sufficient answer to this application. Mr. Hood Barrs nevertheless demanded such an undertaking from the defendant's solicitors. They, as might be expected, refused to give it, and threatened to put in an execution for the costs, which were then paid. The case having come before the House of Lords on appeal, they reversed the decision of this Court. Thereupon this application, which appears to me to be of an entirely unprecedented character, is made. It is not an application for the purpose of giving effect to the judgment of the House of Lords, or made in pursuance of any order of that House remitting the case to this Court for any purpose. Therefore, even if it were well founded on the merits, I do not see what jurisdiction we now have to entertain the matter. But, assuming that we have jurisdiction, I agree with the rest of the Court in thinking that there is no ground upon which the application can be supported.

Application dismissed.

Solicitors for applicant: *Hood Barrs & Co.*
Solicitors for defendant: *Crossman & Prichard.*

E. L.

1896
April 30;
May 2.

In re BARR.
Ex parte WOLFE.

Bankruptcy—Petition—Petitioning Creditor's Debt—"Liquidated Sum, payable either immediately or at some certain future Time"—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*b*).

A debtor, who owed 100*l.* for money lent, accepted a bill of exchange at three months for that amount and interest, and the creditor signed a letter agreeing that the bill should be renewed, provided the interest was paid from time to time. The interest on the first bill was paid, and the bill was renewed. Before the second bill became payable the debtor committed an act of bankruptcy, and the creditor presented a bankruptcy petition against him.

On appeal from an order dismissing the petition:—

Held, that the debt of 100*l.* was "a liquidated sum, payable either immediately or at some certain future time," within the meaning of s. 6, sub-s. 1 (*b*), of the Bankruptcy Act, 1883, and therefore the creditor was entitled to present the petition, and a receiving order ought to be made.

APPEAL by the petitioning creditor from the order of the registrar of the county court of Yorkshire holden at Bradford, refusing to make a receiving order, and dismissing the bankruptcy petition. (1)

The material facts were as follows. In August, 1895, the appellant lent the debtor 100*l.*, to secure repayment of which sum, together with interest, the debtor accepted a bill of exchange for 115*l.* payable three months after date. At the same time the appellant signed a letter containing a clause providing that the bill "shall be renewed, provided the sum of 15*l.* be paid from time to time as interest." In November, 1895, when the first bill became payable, the sum of 15*l.* was paid for interest, and the bill was renewed. Shortly after such renewal the debtor committed an act of bankruptcy, and on January 10, 1896, before the second bill became payable, the appellant presented a bankruptcy petition against the debtor.

(1) By the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 7, sub-s. 3, "If the Court is not satisfied with the proof of the petitioning creditor's debt, or of the act of bankruptcy, or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the Court may dismiss the petition."

April 30. *Carrington*, for the appellant. The registrar's refusal appears to have proceeded on the ground that it would be inequitable, in the face of the appellant's letter, to make a receiving order; but this is a mistaken view, for the debtor, by committing an act of bankruptcy, has altered the position of the parties, and the appellant is justified in taking proceedings in bankruptcy, which probably is the only means by which he can protect his interests. There is a sufficient petitioning creditor's debt to support this petition, for it is clear that "The debt is a liquidated sum, payable either immediately or at some certain future time," within the meaning of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 6, sub-s. 1 (*b*). [He referred to *Mann* v. *Shepherd* (1); *In re Lowe, Ex parte Lowe.* (2)]

C. E. Jones, for the debtor, in support of the order of the registrar. There is no good petitioning creditor's debt, within the meaning of s. 6, sub-s. 1 (*b*). The debt was not payable at some certain future time, for it might have become payable at the expiration of three months from the date of the renewal, or, on the other hand, the period of payment might have been postponed until the expiration of six, or nine, or twelve months, if interest were paid from time to time, as provided by the appellant's letter. It is inequitable, in the face of the implied agreement not to take proceedings contained in that letter, that a bankruptcy petition should be presented, and a receiving order made. There does not appear to be any reported decision directly in point.

[VAUGHAN WILLIAMS J. referred to *Ex parte Douthat.* (3)
KENNEDY J. referred to *Hill* v. *Harris.* (4)]

Carrington, replied.

Cur. adv. vult.

May 2. VAUGHAN WILLIAMS J. This is an appeal from the decision of the registrar of the Bradford County Court refusing to make a receiving order. That refusal was based on the ground that, in the opinion of the registrar, it would be inequitable to make a receiving order. So far as that ground of

(1) 6 T. R. 79.
(2) 7 Morrell, 25.
(3) 4 B. & A. 67.
(4) M. & M. 448.

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decision goes, I think the registrar was wrong. There was an agreement of August 16, 1895, whereby the petitioning creditor in effect undertook to renew an acceptance, which had been given for money lent by him to the debtor, on the terms of forehand interest being paid from time to time. The registrar seems to have thought it inequitable to base the petition on the second acceptance, which had been given by way of renewal after the interest on the first had been paid. We think that, as the debtor had committed an act of bankruptcy, it would not have been inequitable to make a receiving order, and therefore we cannot assent to that ground of decision. We must, however, consider whether there is any other ground on which a receiving order ought to be refused. Under the Bankruptcy Acts prior to 1869, a debt presently due, and payable in the future, would support a petition; but the law was changed by the Act of 1869, which contained no provision to that effect (1); but now, by s. 6, sub-s. 1 (*b*), of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), a petition may be presented if "the debt is a liquidated sum, payable either immediately or at some certain future time." The only question, therefore, is whether the effect of the letter of August 16, 1895, is to prevent the debt from being "a liquidated sum, payable either immediately or at some certain future time." By the letter it was agreed that the acceptance should be renewed, provided the sum of 15*l.* be paid from time to time as interest. Notwithstanding that letter, giving an apparently indefinite right to renewal, we think that a receiving order cannot properly be refused on the ground that there is no debt sufficient to support the petition. I had arrived at this conclusion at the close of the argument, but at my instance we reserved our judgment, because we wished to avoid creating any precedent, the effect of which might be to support a petition based on some different debt from those contemplated by the Act. The only remaining question is, What is the amount of the debt available to support the petition? The time to run is short, but the creditor ought not to be allowed to rely on a larger debt than would remain after deducting the rebate of interest, to

(1) See Williams's Bankruptcy Practice, 6th ed. p. 33.

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which the debtor would be entitled. The total debt includes a bonus for interest larger than that for which the petitioning creditor can have a dividend under s. 23 of the Bankruptcy Act, 1890 (53 & 54 Vict. c. 71). Mr. Carrington for the petitioning creditor is willing to consent that the debt to be inserted in the petition shall be 100*l.*, without prejudice to the right to add whatever the petitioning creditor may be entitled to add for interest; but the petitioning creditor is not to be entitled to say hereafter that our order is conclusive in his favour, except so far as it goes to shew that there is a good debt, on which a bankruptcy petition may be presented. The petition will be based on a debt of 100*l.*, without prejudice to adding whatever may be properly payable for interest. The result is that a receiving order will be made.

KENNEDY J. concurred.

Appeal allowed.

Solicitor for appellant: *Isadore Goldman, for A. V. Hammond, Bradford.*

Solicitor for respondent: *Jacques & Co., for J. H. Harrison, Bradford.*

P. B. H.

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April 30.

In re SCOTT.
Ex parte SCOTT.

Bankruptcy—Act of Bankruptcy—Notice of Suspension of Payment—Declaration of Inability to Pay—Intention to deal with Creditors collectively—Notice by Non-trader—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*h*).

A statement made by a debtor will amount to a notice that he has suspended, or is about to suspend, payment of his debts, within the meaning of s. 4, sub-s. 1 (*h*), of the Bankruptcy, Act, 1883, so as to constitute an act of bankruptcy, if it is in effect a statement that the debtor is unable to pay his debts, and intends to deal with his creditors collectively.

Sect. 4, sub-s. 1 (*h*), applies to non-traders as well as to traders.

MOTION on behalf of the debtor, Alice Scott, to set aside a receiving order made by the registrar of the county court of Kent holden at Canterbury, and to dismiss the bankruptcy

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petition. The alleged acts of bankruptcy relied upon on behalf of the petitioning creditors were, first, beginning to keep house with intent to defeat or delay her creditors; as to this the registrar decided in favour of the debtor, and refused to make a receiving order on that ground; secondly, certain letters, one of them written by the debtor's mother, and the others by the debtor herself, which were relied upon as amounting to notices that the debtor had suspended, or was about to suspend, payment of her debts, within the meaning of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*h*); as to these letters the registrar made a receiving order, but as this part of the case depends on the construction of the particular documents, and the circumstances under which they were written, the letters are omitted; thirdly, the petitioning creditors relied on statements made by the debtor in conversation with one of her creditors as amounting to a similar notice of suspension of payment.

The debtor was an unmarried lady, of no occupation, who lived with her mother in a house at Broadstairs. The facts with regard to the conversation were stated in the affidavit of William Lane Sear, filed on behalf of the petitioning creditors, which was accepted by the Divisional Court as containing an accurate statement of what had taken place. Mr. Sear in his affidavit stated that he was a creditor for 125*l.* for money lent and interest, and continued as follows: "On Friday, 17th January inst., at 10 A.M., I called at the residence of the said Alice Scott, and in response to my ring a servant opened the door on the chain. I asked to see Miss Scott. The servant said, 'Miss Scott will not see anybody.' In response to a more urgent application the servant left, while I held my stick in the door to prevent its being shut. Miss Scott stepped forward to the door. I requested her to remove the chain, but she refused, and said she would see no one. Miss Scott then said, 'If you come to-night after the "Granville" (1), I will pay you.' I then left, and the same afternoon received a letter from Miss Scott asking me to come upon the following instead of that night. On Saturday, 18th January, I called at the residence of the

(1) An express train from London.

debtor between 5 and 6 P.M. In response to my ring a servant opened the door on the chain, and said, 'You cannot see Miss Scott, she is not seeing anybody.' I urged she would see me if the servant took in my name. Eventually I heard Miss Scott's voice from inside calling out to me, 'I won't see you, Mr. Sear. I am advised not to see anybody, and besides that I have a bailiff in the house.' I said, 'Won't you pay Mr. Lewis's (1) account as you promised?' Miss Scott said, 'No, I won't pay anybody now.' I urged that she should see me, alleging that I was disposed to help her; she replied, 'It is too late, I am acting under advice, and I refuse to see anybody at all, but you can see the bailiff if you like.' The bailiff stepped forward to the door, and said he was in possession on behalf of Fielding & Co., and their claim was a good deal over 200*l*. I did not see the debtor at all on the 18th."

J. H. W. Weigall, for the debtor, in support of the motion. No act of bankruptcy has been committed, and the receiving order was wrongly made. With regard to the conversation of January 18, referred to in the affidavits, there is nothing in what the debtor then said which can bring the case within the terms of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 4, sub-s. 1 (*h*), by which an act of bankruptcy is committed "if the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts." What the debtor said to Mr. Sear at that conversation amounts to nothing more than a statement that she could not pay then, and required time, and it is impossible to say that every declaration of inability to pay at the time when the statement is made, and every request for time, can be treated as an act of bankruptcy. [He also contended that the letters did not come within the section, and referred to the following authorities: *Ex parte Oastler, In re Friedlander* (2); *Crook* v. *Morley* (3); *In re North, Ex parte Hasluck* (4); *In*

(1) Mr. Lewis was one of the petitioning creditors.

(2) 13 Q. B. D. 471.

(3) [1891] A. C. 316; affirming decision of Court of Appeal, 24 Q. B. D. 320.

(4) [1895] 2 Q. B. 264.

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re Walsh, Ex parte the Trustee (1); *In re Wolstenholme, Ex parte Wolstenholme* (2); *In re Selwood, Ex parte Dash* (3); *In re Waite, Ex parte Bentley's Yorkshire Breweries Co.* (4); *In re Morgan, Ex parte Turner.* (5)]

Muir Mackenzie, for the petitioning creditors, in support of the receiving order. The conversation of January 18 brings the case within the Act. The debtor distinctly stated that she could not pay any one then, and that she was acting under advice. The only fair inference is that she had determined not to pay any creditor who came to ask for his debt, but that she intended to try to make some arrangement with the whole body of her creditors. [He also contended that the letters came within the section, and, in addition to the cases already mentioned, referred to *In re Lamb, Ex parte Gibson & Bolland.* (6)]

Weigall, in reply, referred to *Ex parte Nickoll, In re Walker.* (7)

VAUGHAN WILLIAMS J. This motion raises a new point, about which we find very little in the old cases, the reason being that in the old cases in which similar questions have arisen the debtor has been a trader, and a circular has been sent out to the creditors, and the question which has arisen in each case has been, whether the circular amounted to a notice of suspension of payment, or a notice of intention to suspend payment. In the present case the debtor was not a trader, and no circular was sent out; to a large extent, therefore, we must deal with the question without the assistance of authority.

It is contended that a notice of suspension of payment was contained in the conversation which took place on January 18 between Mr. Sear and the debtor. It is contended also that the letters written by the debtor and her mother were notices of suspension of payment, or of an intention to suspend payment, within the meaning of s. 4, sub-s. 1 (*h*), of the Bankruptcy

(1) 2 Morrell, 112.
(2) 2 Morrell, 213.
(3) 1 Manson, 66.
(4) 1 Manson, 512.
(5) 2 Manson, 508.
(6) 4 Morrell, 25.
(7) 13 Q. B. D. 469.

Act, 1883. In my judgment no one of those letters constituted such a notice, within the meaning of that section. [The learned Judge discussed the letters, and continued as follows :—]

In those circumstances it really becomes necessary only to deal with the conversation of January 18, and in dealing with it I do not take into consideration any of the letters which were written subsequently. The conversation took place on January 18, and the question to be decided is whether a notice of suspension of payment, or of intention to suspend payment, was given at that time. I adopt the account of the conversation given in Mr. Sear's affidavit. It is true that that account is somewhat qualified by the other evidence, especially by the evidence of Miss Scott herself; but, as the registrar has found that there was an act of bankruptcy, I think we ought to take the evidence of Mr. Sear as having been accepted by the registrar. I do not think myself that the Legislature really intended s. 4, sub-s. 1 (*h*), to have any application other than to traders; but they have used the words in such a way as to give them their popular meaning, and therefore I am not prepared to say that the sub-section does not also extend to non-traders. The question in the present case is, did the debtor on January 18 give a notice of suspension of payment, or of intention to suspend payment? And in dealing with this question we may take into consideration the fact that she was not a trader. If we were to hold that every refusal to pay a debt when demanded was a notice of suspension of payment, merely because it was based on the excuse of inability to pay the debt at that moment, we should be giving far too wide an application to s. 4, sub-s. 1 (*h*). To operate as such a notice, the statement must be a notice of intention to suspend payment of debts in the ordinary course. With regard to a trader it means a notice of suspension of payment of all commercial debts when they are due and payable. If a refusal to pay such debts is based on inability to pay them at the usual time, I can understand that such a refusal may amount to a notice of suspension of payment. In the case of a trader it would be a notice of intention to suspend payment of debts when they became payable in the ordinary way; but in the case

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of a private person the ordinary course of payment is not the same, for in such a case a creditor cannot expect that the debtor will always have the money ready. If the creditors of a trader are not paid at certain times, that is a departure from the ordinary course of business; but in the case of a non-trader it is impossible to say that the mere fact that the debtor says, "I cannot pay you now; I cannot pay until I receive my rents," or, "until I receive my next dividends," amounts to a notice of suspension of payment. If we look at this case as if there had only been an application for payment, and the creditor had been told to call again, and receive payment for himself and for Mr. Lewis, and when he called again the next day the debtor had said, "I cannot pay now, but I hope to pay every one soon," that in itself would not amount to a notice of suspension of payment. I am convinced that s. 4, sub-s. 1 (*h*), is meant to apply to the case of a debtor dealing with his creditors as a body. If a debtor gives notice to one of his creditors that he cannot pay, and that he will deal with all his creditors as a body, that will amount to a notice of suspension of payment; but the notice will not come within the section unless the debtor is dealing with his creditors as a body. In the present case the only notice given was that given by the debtor to Mr. Sear, that at that moment she could not pay him and Mr. Lewis, or any of her creditors. That by itself might not come within the section; but she went on to add that she had taken advice, and that she would not pay any one. That is not an answer to these two people only; what she was really saying was, "I cannot pay you or any one else; I have taken advice, and I am advised that I must deal with my creditors collectively." For that reason I have come to the conclusion that this announcement did amount to a notice of suspension of payment, or of intention to suspend payment, within the meaning of s. 4, sub-s. 1 (*h*). I do not hold that this notice comes within the section, on the ground that it is based on inability to pay; if that were all, it would not be sufficient; but it amounted to a notice that she had taken advice, and intended to deal with her creditors collectively,

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and therefore it comes within s. 4, sub-s. 1 (*h*), and on that ground this motion must be dismissed.

KENNEDY J. I am of the same opinion. I arrive at this conclusion somewhat reluctantly, because my impression is that the view of the Legislature was not to apply s. 4, sub-s. 1 (*h*), to private individuals, but to confine its operation to the case of a trader, with whom his creditors would deal in the ordinary course of business. It is impossible to read the judgments in the various cases without seeing much that tends to support this view. For instance, in *Crook* v. *Morley* (1), Lord Selborne said: "A stoppage of business in the ordinary course, and of the payment of debts in the ordinary course, is so serious a thing in many if not in all businesses, certainly for example in the business of a banker, that the Legislature might well consider it a sufficient reason for giving the creditors the power of treating it as an act of bankruptcy in itself, without entering into the question whether in conceivable circumstances and by conceivable methods it might not come to an end and business be resumed." (2) At the same time we are not at liberty to act on that view, for there are special provisions in the Bankruptcy Act as to traders, whereas the terms of s. 4, sub-s. 1 (*h*), are general. I wish to adopt what Vaughan Williams J. has said as to the importance of considering the time at which the notice is given, and I need not repeat it. In the present case I am compelled to come to the conclusion that, if we adopt Mr. Sear's evidence as correct, as I think we ought, because the registrar has acted upon it, the debtor, on January 18, was intending to indicate that, acting under advice, she found she was in a state of insolvency, and she must deal with all her creditors together, and was not free to deal with each of them separately, in the way of paying them their just debts as they came to demand them. I come therefore to the conclusion that, giving a fair meaning to s. 4, sub-s. 1 (*h*), the present case comes within the terms of that clause, and therefore the order of the registrar was right, so far as related to the conversation of January 18. As to the letters, if they stood

(1) [1891] A. C. 316. (2) [1891] A. C. at p. 319.

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alone, I am very clear that there would not be sufficient to amount to notice of suspension of payment.

Motion dismissed.

Solicitors for the debtor: *Kingsford & Dorman, for Burrows & Weigall, Margate.*

Solicitors for the petitioning creditors: *Prior, Church & Adams, for Sparkes & Emery, Ramsgate.*

P. B. H.

C. A.

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April 28, 30.

[IN THE COURT OF APPEAL.]

WILLSON AND ANOTHER *v.* LOVE AND OTHERS.

Penalty—Landlord and Tenant—Lease of Farm—Covenant not to carry away Hay and Straw—Damages—Stipulations of varying Importance.

Where a lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises during the last twelve months of the term, but to consume the same upon the premises, and provided that an additional rent of 3*l.* per ton should be payable by way of penalty for every ton of hay or straw so sold, and it appeared that there was a substantial difference between the manurial value of hay and that of straw:—

Held, that the sum so made payable was a penalty and not liquidated damages.

APPLICATION by plaintiffs for judgment or new trial in a case tried before Collins J. with a jury. The action was brought by executors of lessor against lessees under the following circumstances.

A lease of a farm for a term of years provided that the premises should be held by the lessees paying a certain rent by equal half-yearly payments, "and also yielding by like half-yearly payments the additional rent of 20*l.* for every acre (and so in proportion for any less quantity) of pasture or meadow land which shall during the said term be broken up or converted into tillage without the previous consent in writing of the lessor, and the additional rent of 3*l.* per ton by way of penalty for every ton of hay or straw which shall be sold off the premises during the last twelve months of the tenancy, provided also that for every ton of hay or straw so sold off the

premises before the lastly hereinbefore-mentioned twelve months the lessees shall bring an equivalent in manure on the land." The lease contained a covenant that the lessees would not during the last twelve months of the term sell or dispose of, or carry away any hay, straw, grass, clover, turnips, or fodder which should grow upon or be produced from the demised premises or any part thereof, but would spend and consume the same upon the premises. Hay was sold off the premises during the last year of the term.

The plaintiffs in their statement of claim claimed the sum of 3*l.* per ton in respect of the hay so sold as liquidated damages, or in the alternative unliquidated damages for breach of covenant. The defendants had paid money into court. It appeared from the evidence that the manurial value of hay was from 15*s.* to 1*l.* per ton, that of straw being from 4*s.* to 5*s.* less. The learned judge ruled that the sum of 3*l.* per ton mentioned in the lease was a penalty, and not liquidated damages, and that the manurial value of the hay sold was the proper measure of damages. The jury assessed that value at a sum which was covered by the payment into court, and judgment was accordingly entered for the defendants.

Forbes, Q.C., and *H. Manisty*, for the plaintiffs. The sum of 3*l.* per ton made payable by the lease is not a penalty. It is reserved as an additional or penal rent payable in the alternative in the event of non-performance of a covenant, which is a different thing altogether: *Wright* v. *Tracey* (1); *Pollitt* v. *Forrest*. (2) It is well settled, moreover, that the use of the term "penalty" or "liquidated damages" by the parties is not conclusive, but the nature of the stipulations with regard to which the sum in question is made payable must be regarded. There is no decision to the effect that, wherever one sum is made payable in respect of several stipulations of different degrees of importance, it is a penalty; and the late Master of the Rolls (Sir G. Jessel) pointed out in *Wallis* v. *Smith* (3) that the dicta to that effect are contrary to earlier authorities.

(1) Ir. Rep. 7 C. L. 134. (2) 11 Q. B. 949.
(3) 21 Ch. D. 243.

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In some cases it has, no doubt, been said that, where one sum is named with regard to stipulations, some of serious and some of very trifling importance, it is a penalty; the reason being that in such a case it is not reasonable to suppose that the parties intended it to be liquidated damages. But the present case is not of that kind. Having regard to the difficulty of ascertaining exactly how much damage would be occasioned by a breach of such a stipulation as this, the parties might reasonably fix upon a sum as liquidated damages, and the difference between the damage to the land by selling off hay and that by selling off straw is not so great as to render it unreasonable to suppose that they intended to do so.

If there were separate clauses as to hay and straw, and in each 3*l.* per ton was the sum specified, it would be difficult to say it was not liquidated damages. It is immaterial that the stipulations are included in the same clause.

[They cited *Betts* v. *Burch* (1); *Kemble* v. *Farren*. (2)]

Channell, Q.C., and *Meek*, for the defendants. In many of the cases the question has been whether, the parties having themselves called the sum made payable "liquidated damages," the Court could nevertheless say it was a penalty. Here it is to be observed that the parties themselves have spoken of this sum as payable by way of penalty. That circumstance is, no doubt, not conclusive, but it is an element to be considered in arriving at what the intention was; and, if on looking at the nature of the stipulation no paramount reason appears why the parties should not have intended what they said, the Court will treat them as meaning what they said. When the nature of the stipulations is looked at, it appears that the sum named covers two stipulations, the damages for breach of which are substantially different. There is a series of dicta, which cannot be considered as overruled by *Wallis* v. *Smith* (3), to the effect that where that is so the sum named must be looked upon as a penalty. The result of the authorities seems really to be that where there are good reasons why the parties should have agreed upon a sum by way of liquidated damages—for instance, where

(1) 4 H. & N. 506. (2) 6 Bing. 141.

(3) 21 Ch. D. 243.

it would be impossible or very difficult exactly to estimate the damages—the Court will presume that such was their intention; but, on the other hand, where the stipulation is for payment of an ascertained sum, or where the damages can easily be estimated and will not be the same for one breach of the contract as for another, as in the present case, it is unreasonable to suppose that the parties intended the sum made payable to be liquidated damages: a fortiori, where they themselves call it a penalty.

[They cited *Law* v. *Local Board of Redditch* (1); *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (2); *Sparrow* v. *Paris* (3); *Sainter* v. *Ferguson* (4); Mayne on Damages, 5th ed. p. 148.]

Forbes, Q.C., in reply, cited *Dimech* v. *Corlett.* (5)

LORD ESHER M.R. The question raised in this case is whether the sum of 3*l.* per ton, which by the terms of the lease is to be paid in respect of hay or straw sold off the premises in the last year of the term, is upon the true construction of the lease a penalty or liquidated damages. That question is one of construction, which is for the judge alone; but, in order to construe the lease, regard must be had to the facts which existed at the time when it was made. One of those facts is that there is a difference between the manurial value of hay and that of straw to the extent of 4*s.* or 5*s.* a ton, which appears to me to be a material difference. That being so, we find that the lease provides for the payment of one and the same sum for breach of the stipulation with regard to hay and for breach of that with regard to straw. In this case the parties have themselves said that that sum is to be payable by way of penalty. It was attempted to draw a nice distinction on the ground that the parties have spoken of it as a "rent" payable by way of penalty; but that distinction with regard to this case appears to me quite unsubstantial. Therefore the parties have themselves called this sum a penalty. That circumstance is not in itself decisive of the question. A succession of judges have held that the use

(1) [1892] 1 Q. B. 127.
(2) 11 App. Cas. 332.
(3) 7 H. & N. 594; 31 L. J. (Ex.) 137.
(4) 7 C. B. 716.
(5) 12 Moo. P. C. 199.

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of the term "penalty" or "liquidated damages" is not conclusive; but no case, I think, decides that the term used by the parties themselves is to be altogether disregarded, and I should say that, where the parties themselves call the sum made payable a "penalty," the onus lies on those who seek to shew that it is to be payable as liquidated damages. There is no absolute decision with regard to such a case as this, except the Irish case to which I will presently refer; but there are many dicta by eminent judges applicable to it. Sir George Jessel, in the case of *Wallis* v. *Smith* (1), went through those dicta finding fault with them, and, as I understand him, he came to the conclusion that, if the question were arising for the first time, he should decide contrary to them, and hold that the parties were bound by what they had themselves agreed to; but I do not think he can be considered as having intended to overrule them. Since that case this question has come before the House of Lords, and, though what they said may not amount to an actual decision on the subject, it appears to me impossible to hold that they have overruled those dicta. On the contrary, they appear to me to have adopted them. In the case of *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (2) Lord Watson said: "When a single slump sum is made payable by way of compensation on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification." I think the effect is substantially the same as if, instead of the words "some of which may occasion serious and others but trifling damage," he had said "some of which may occasion serious and others less serious damage"; and the rule so laid down is in accordance with all the dicta which had gone before; and it is laid down after the observations made with regard to them by Jessel M.R. Then, in the same case, Lord Herschell said: "The agreement does not provide for the payment of a lump sum upon the non-performance of any one of many obligations differing in importance." In this case, although there is a substantial difference between the damages which would arise on two events, the same sum is

(1) 21 Ch. D. 243. (2) 11 App. Cas. 332, 342.

made payable in either event. Under those circumstances I think that this sum is a penalty and not liquidated damages. The Irish case of *Wright* v. *Tracey* (1) was cited to us as an authority in favour of the plaintiffs' contention. We are not bound by that decision, and I cannot agree with the view taken by the Court in that case. There one sum of 200*l.* was to be paid in the event of the breach of any one of several stipulations of very different degrees of importance, namely, for the keeping in repair of fences, a churn, and gates, and that the tenant would not underlet or assign the premises. If the dicta in the English cases are correct, it is obvious that that sum was a penalty and not liquidated damages. It appears to me unreasonable to put a stipulation for the repair of a churn on the same footing as an agreement not to underlet or assign, and that it is impossible to suppose that a tenant was to pay a sum of 200*l.* by way of liquidated damages for a breach of the former stipulation. For these reasons I think this application must be refused.

A. L. SMITH L.J. I am of the same opinion. Speaking for myself, I must say that I cannot doubt that the sum in question is a penalty and not liquidated damages. I believe that from the time of *Kemble* v. *Farren* (2) down to the present day it has been the recognised opinion of the legal profession that, where a sum is made payable by a contract to secure performance of several stipulations, the damages for the breach of which respectively must be substantially different, or, in other words, the performance of stipulations of varying degrees of importance, that sum is primâ facie to be regarded as a penalty and not as liquidated damages: *Betts* v. *Burch* (3), *Sparrow* v. *Paris* (4), and per Lord Watson and Lord Herschell in *Lord Elphinstone* v. *Monkland Iron and Coal Co.* (5) In this case a sum of 3*l.* per ton is made payable to secure performance of two stipulations, one as to hay, the other as to straw; and the evidence shews that these stipulations were of varying

(1) Ir. Rep. 7 C. L. 134.
(2) 6 Bing. 141.
(3) 4 H. & N. 506.
(4) 7 H. & N. 594; 31 L. J. (Ex.) 137.
(5) 11 App. Cas. 332, 342.

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degrees of importance; and therefore it seems to me that primâ facie the sum so made payable is a penalty and not liquidated damages. There is also another matter worthy of observation in reference to the contract in the present case. In many previous cases the question before the Court has been whether, the parties having agreed that a sum should be paid as "liquidated damages," the Court could see their way to the conclusion that the sum so made payable was nevertheless a penalty. In this case I cannot shut my eyes to the fact that the parties do not say that the sum of 3*l.* per ton is to be paid as liquidated damages, but by way of penalty. Why, where that is so, should the Court say that the parties did not mean what they have said? If they had meant what the plaintiffs are contending for, they ought to have called this sum "liquidated damages." The fact that they have called it a penalty is no doubt not conclusive; but I think that, where a sum is spoken of by the parties themselves as a penalty, a strong case is required to shew that it is nevertheless liquidated damages, and I cannot find this in the present case.

RIGBY L.J. I agree that the application should be dismissed, but I cannot say that I feel so clear on the matter as my brother Lord Justice. I do not think that the authorities have even yet laid down any very clear rule by which to determine the question whether in cases of this kind the sum made payable is a penalty or liquidated damages. The judgment in *Kemble* v. *Farren* (1), which is one of the most important decisions on the subject, seems to have been construed by Jessel M.R. in *Wallis* v. *Smith* (2) and James L.J. in *In re Newman* (3) in a totally different way. When the matter is looked into, it appears that the difference between the views which they respectively took of that case depends on the true construction of a leading sentence in the judgment which is certainly ambiguous. On the one hand we have the destructive criticisms of Jessel M.R., in the course of which he points out that there are at least two decisions to the contrary of the view

(1) 6 Bing. 141. (2) 21 Ch. D. 243.
(3) 4 Ch. D. 724.

expressed in *In re Newman* (1); and on the other hand we have the observations of James and Bramwell L.JJ. in *In re Newman* (1), and of Lord Coleridge C.J. in *Magee* v. *Lavell.* (2) The history of the decisions appears to me to lead to the conclusion that the Courts made a mistake when they departed in regard to these cases from the general rule that effect ought to be given to the terms of the agreement entered into by the parties, and that, when once that rule was departed from, it became extremely difficult to arrive at any clear rule on the subject. If I had had to decide this case independently, I might perhaps have come to a conclusion different from that at which Collins J. at the trial, and the Master of the Rolls and my brother A. L. Smith in this Court, have arrived; but I cannot say that I have been able, as the result of the authorities to which we have been referred, to grasp any general principle with sufficient clearness to enable me to give a judgment differing from that of the learned judge below and the other members of the Court. The case of *Wallis* v. *Smith* (3), which has been relied upon for the plaintiffs, does not in my opinion render much assistance in deciding this case. The actual decision in the case appears to me to be undoubtedly right; but the question which in effect was being dealt with was as to the forfeiture of a deposit—a question which involves different considerations from those involved in the present case. There are, no doubt, various observations in the judgments applicable to a case such as the present, which I will not call dicta, because they were certainly made by way of reasons for the decision arrived at, but it appears to me that some of the phrases used in them require definition. It seems on the one hand to be generally admitted that where, among various stipulations covered by one sum, whether called a penalty or liquidated damages, is included a stipulation for payment of a smaller sum of money, that is a case of penalty and not liquidated damages; on the other hand it is stated that, where the damages caused by a breach of a contract are incapable of being ascertained, the sum made by the contract

(1) 4 Ch. D. 724. (2) L. R. 9 C. P. 107.
(3) 21 Ch. D. 243.

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payable upon such a breach is to be regarded as liquidated damages. The question arises, What is meant in this statement by the expression "incapable of being ascertained"? In their proper sense the words appear to refer to a case where no rule or measure of damages is available for the guidance of a jury as to the amount of the damages, and a judge would have to tell them they must fix the amount as best they can. If that be the meaning, it may be observed that it is impossible to say that the damages in this case were incapable of being ascertained in that sense.

Application refused.

Solicitors for plaintiffs: *Wilmer & Reeves, for A. W. Granger, Durham.*

Solicitors for defendants: *Cunliffes & Davenport, for J. G. Wilson, Ornsby & Cadle, Durham.*

E. L.

C. A. 1896 *May* 4.

[IN THE COURT OF APPEAL.]

THE QUEEN *v.* SODEN.

Parliament—Franchise—Registration—Revising Barrister closing List—6 & 7 *Vict. c.* 18, *s.* 41; 28 & 29 *Vict. c.* 36, *s.* 15.

A notice of the revision of the lists of parliamentary and municipal electors for a borough stated that the lists for a certain parliamentary division of the borough would be closed at a certain sitting of the revision court. At the termination of that sitting the revising barrister, having ascertained that there were no other claimants or persons objected to present who desired to be heard, declared the list closed. On the following day he proceeded in open court to read out and to initial the names which he expunged from or inserted in the list. Certain claimants, on their names being thus read out, applied for the first time to be heard in support of their claims. The revising barrister declined to hear them on the ground that they were then too late, and expunged their names from the list:—

Held, affirming the judgment of the Queen's Bench Division, that the claimants had under the circumstances no right to be heard.

APPEAL from the order of a Divisional Court (Lawrance and Collins JJ.), discharging a rule nisi for a mandamus to a revising barrister to hear and determine the claims of the

applicants to be included in a list of parliamentary electors or to state a case.

The facts appear in the report of the case in the Court below. (1)

Mattinson, Q.C., and *Sylvain Mayer*, for the applicants. Their argument was to the same effect as in the Divisional Court.

William Graham, for the revising barrister, was not called upon to argue.

LORD ESHER M.R. It seems to me that the revising barrister in this case followed the usual course taken by revising barristers. He had given notice that the lists for a certain division of a borough would be closed on a certain day. Whether, if on the evening of that day there had been claimants present whose cases still remained undisposed of, he would have sat till a late hour at night or postponed their cases till the next day is immaterial. What happened was this. These claimants were represented by an agent who was present. At the close of the sitting the barrister inquired in open court whether there were any more claimants or persons objected to present, and, finding that there were none, he declared the list closed. It seems to me that that was equivalent to a decision that these claimants should be struck off. After that he had nothing to do on the next day but to go through the clerical work of calling out and erasing the names of those whose claims had really been disallowed on the previous evening. How it can possibly be contended under these circumstances that there ought to be a mandamus to him to hear and determine these claims I cannot see. This appeal must be dismissed.

A. L. SMITH L.J. I am of the same opinion. In this case the revising barrister duly gave public notice that the list for a particular division of the borough would be taken on Monday and Tuesday, September 16 and 17, and would be closed on the evening of the latter day. He went through the list on those

(1) Ante, p. 499.

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days, and late on Tuesday evening, having heard everybody who chose to appear, he asked in open court whether there was anybody else who wished to be heard, and, finding that there was not, declared the list closed. The next day he proceeded to read out the names which he erased and initial the erasures. Then these claimants came forward, and claimed to be entitled as of right to have their cases adjudicated upon, though they did not choose to come on either of the two days appointed for hearing claims; and, the revising barrister having declined to hear them, they apply for a mandamus to compel him to do so. It appears to me that their application is altogether groundless.

RIGBY L.J. concurred.

Appeal dismissed.

Solicitor for applicants: *A. Scott Lawson, for Walter & E. H. Foster, Leeds.*

Solicitors for revising barrister: *Hickin, Smith & Capel Cure.*

E. L.

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April 27.

ALTY *v.* FARRELL.

Local Government—By-law—Validity—Sale of Coal from Vehicle—Requisition to Weigh—Weights and Measures Act, 1889 (52 & 53 *Vict. c.* 21), *s.* 28.

By a by-law made by a local authority under s. 28 of the Weights and Measures Act, 1889, which enables local authorities to make by-laws regulating the sale of coal in small quantities, "Every person in charge of any vehicle carrying coal for sale . . . . in quantities not exceeding two hundredweight . . . . shall re-weigh the coal upon being requested to do so by any purchaser, or by any one on behalf of the purchaser, or by an inspector of weights and measures, or by any constable":—

Held, by Lord Russell of Killowen C.J. (Wright J. doubting), that the section authorized the making of a by-law requiring the coal to be weighed by the person in charge of the vehicle, but

Held by the Court that the by-law was unreasonable, and therefore bad.

CASE stated by justices under the Summary Jurisdiction Acts.

The appellant, Thomas Alty was a coal hawker, and on August 16, 1895, he was in charge of a vehicle carrying coal for sale within the borough of Blackburn, in quantities not

exceeding two hundredweight. He was stopped by the respondent, an inspector of weights and measures, who requested him to weigh a bag of coal. The appellant was carrying with the vehicle a perfect weighing instrument of a form approved of by the corporation, but he declined to weigh the coal.

By a by-law made under s. 28 of the Weights and Measures Act, 1889, by the corporation of the borough of Blackburn as the local authority, and approved by the Board of Trade, "Every person in charge of any vehicle carrying coal for sale within the borough in quantities not exceeding two hundredweight shall carry with such vehicle a perfect weighing instrument of a form approved of by the corporation, together with correct weights, and such person shall re-weigh the coal upon being requested to do so by any purchaser, or by any one on behalf of the purchaser, or by an inspector of weights and measures, or by any constable."

Another by-law imposed a penalty for breach of any of the by-laws.

On an information preferred by the respondent against the appellant for breach of the by-law, the justices convicted the appellant, but stated this case for the opinion of the Court.

T. Willes Chitty, for the appellant. The by-law is bad. It is ultra vires. There is nothing in s. 28 to empower the local authority to make a by-law requiring the seller personally to re-weigh the coal at the request of any one, still less at the request of a constable. Certain powers are given by the Act to inspectors of weights and measures, and officers appointed for the purpose, which are not given to constables: see ss. 25, 27, and 29. But here the by-law empowers a constable to impose upon the seller the labour of re-weighing the coal. Secondly, it is unreasonable. There is no limit to the number of times that any one of the various persons named in the by-law can call upon the seller to re-weigh the same sacks.

A by-law containing similar provisions came before the Court in *Kent County Council* v. *Humphrey* (1); but the Court refrained from expressing any opinion as to the validity of so

(1) [1895] 1 Q. B. 903.

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much of it as required the seller to re-weigh the coal upon request.

Mattinson, Q.C., and *A. T. Lawrence*, for the respondent. The by-law is within the powers contained in s. 28, sub-s. 1 (*a*), which empowers by-laws to be made "regulating for the purposes of this Act the sale of coal in quantities not exceeding two hundredweight." The word "sale" there is meant to include anything incidental and preparatory to sale. Nor can the by-law be said to be unreasonable if, as is the case, it does not impose any substantially greater obligation than that imposed by the Act itself. If the coal in question had been kept for sale in a shop the seller might have been required personally to weigh it under s. 25, and there is no greater hardship in being required to weigh it when on a cart in the street. An inspector of weights and measures may ask a person in charge of a coal cart to do what he is entitled to do himself by s. 29, that is to say, weigh or re-weigh the coal.

LORD RUSSELL of KILLOWEN C.J. Speaking for myself, I am most unwilling, where it can be avoided, to interfere with the exercise by a local authority of the powers entrusted to them by such an Act as this. It is plain that the object of the by-law in question was to protect persons in a humble position of life who are accustomed to buy coals in small quantities. But in considering such a by-law we have to see first whether the statute gives power to the local authority to make a by-law on the particular subject, and then, if that is so, whether the by-law which the local authority has made is in itself reasonable.

The appellant was convicted for the breach of a by-law which purported to be made under s. 28 of the Weights and Measures Act, 1889, which provides that any local authority may from time to time make by-laws regulating for the purposes of the Act the sale of coal in quantities not exceeding two hundredweight. The first question that we have to decide is, therefore, whether this provision enables the authorities of the borough of Blackburn to make such a by-law. I am of opinion that the section does give local authorities that power

so far as the subject-matter of the by-law is concerned. The next question however, whether the particular by-law is reasonable, is a more difficult one. I am not without doubt upon it, but I have come to the conclusion that it is not reasonable. Looking at the existing provisions of the statute, there seems to me to be very ample protection for the buyers of small quantities of coal even without this by-law, and I am glad to think that a very little alteration of the by-law itself, if found to be necessary, would make it into a good and valid by-law. The sections dealing with the subject are ss. 25–29 of the Act. Sect. 25 provides for the keeping of weighing instruments in places where coal is sold by retail, and s. 26 for the erection at convenient places of weighing instruments. Then s. 27 provides that any seller or purchaser of coal, person in charge of a vehicle in which coal is carried, inspector of weights and measures, or other officer appointed for the purpose by the local authority, may require any coal to be weighed or re-weighed; and there is a provision that where the coal is weighed or re-weighed at the instance of the purchaser, if such coal shall then be found to be of the weight stated by the seller, the purchaser shall be liable to pay all reasonable costs incurred in the weighing or re-weighing. I think that this section only applies to a weighing or a re-weighing with a fixed machine, such as is contemplated by ss. 25 and 26.

Sect. 28, as I have already said, gives power to local authorities to make by-laws regulating the sale of coal in quantities not exceeding two hundredweight; and by s. 29, "Any inspector of weights and measures, or officer appointed for the purpose by the local authority, may at all reasonable times enter any building or part of a building, or other place in which coal is sold or kept or exposed for sale, and may stop any vehicle carrying coal for sale or for delivery to a purchaser, and may test any weights and weighing instruments found in any such place or vehicle, and may weigh any load, sack, or other less quantity of coal found in any such place or vehicle, or which is in course of delivery to any purchaser." That is, of course, a very wide power, since it enables a vehicle carrying coal to be

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stopped at any point on its journey and its contents weighed or re-weighed. But that section gives this wide power to an inspector of weights and measures, or to an officer appointed for the purpose by the local authority. The by-law under consideration goes further, and gives the right to require the coal to be re-weighed, to the purchaser or any one on his behalf, and to any constable, in addition to any inspector of weights and measures.

The by-law is divisible into two parts. The first part of it, requiring that a proper weighing instrument shall be carried by all vehicles carrying small quantities of coal for sale, has already been considered and has been held to be good in *Kent County Council* v. *Humphrey*. (1) It is with the second part of the by-law that we have to deal: "Such person"—that is to say, every person in charge of any vehicle carrying coal for sale in quantities not exceeding two hundredweight—"shall re-weigh the coal upon being requested to do so by any purchaser, or by any one on behalf of the purchaser, or by an inspector of weights and measures, or by any constable." There is no limitation that the request must be reasonable, and it seems to be possible within the construction of the by-law that the man might have to weigh the coal again and again at the request of each one of these parties. Further, the by-law gives power to every constable in Blackburn to require that such coal should be weighed or re-weighed. I very much doubt whether, when the Act gave power to the local authority by s. 29 to appoint officers for the purpose of weighing such coal, it was intended that that power should be conferred on all the constables of a borough. In my opinion the Act contemplated the selection of special persons for the purpose, and not the general delegation of the power to all constables. For these reasons, and not without some doubt, I have come to the conclusion that the by-law is unreasonable and therefore bad.

WRIGHT J. I agree, and for the reasons given; and I will only add that for my part I doubt whether the powers given by

(1) [1895] 1 Q. B. 903.

the Act to local authorities to make by-laws regulating the sale of coal in small quantities would cover such a by-law as this.

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Appeal allowed.

Solicitor for appellant: *F. J. Thairlwall, for Alfred Read, Blackburn.*

Solicitors for respondent: *Robbins, Billing & Co., for W. E. L. Gaine, Blackburn.*

A. P. P. K.

BURNETT, APPELLANT; BERRY, RESPONDENT.

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April 28.

Municipal Corporation—By-law—Validity—Using Streets for Betting—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 23.

Sect. 23 of the Municipal Corporations Act, 1882, empowers the council of a borough to make by-laws "for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable by virtue of any Act in force throughout the borough."

A by-law made under this section prohibited, under a penalty, any person from frequenting and using any street or other public place within the borough for the purpose of bookmaking or betting:—

Held, that the by-law was one which could properly be made for the good rule and government of the borough, and was, therefore, valid.

CASE stated, under the Summary Jurisdiction Acts, by the stipendiary magistrate for the Wolverhampton and South Staffordshire district.

The respondent was summoned before the magistrate at a court of summary jurisdiction to answer an information preferred by the appellant, charging that the respondent on specified dates at the borough of Wolverhampton, within the said district, "unlawfully did frequent and use a certain street, to wit Wulfruna Street, within the said borough, for the purpose of bookmaking and betting," contrary to a by-law of the borough in force at the time of the commission of the alleged offence. The by-law was as follows: "Any person who shall frequent and use any street or other public place within the borough of Wolverhampton for the purpose of bookmaking or betting or wagering, or agreeing to bet or wager, with any

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person shall be liable to a penalty not exceeding 5*l.*" It was proved or admitted at the hearing of the information that the respondent did, on the days mentioned therein, frequent and use the place mentioned therein for the purpose of book-making and betting, but that he did not cause any obstruction or nuisance by so doing.

The magistrate held that the by-law was ultra vires and void, and accordingly dismissed the summons.

The question for the opinion of the Court was whether, upon the above facts, his decision was correct.

Bosanquet, Q.C. (*C. W. Matthews* with him), for the appellant, was stopped after reading the case and stating the point raised.

H. E. Richards (*Jelf, Q.C.*, with him), for the respondent. The magistrate was right. The only power the council have to make by-laws is under s. 23 of the Municipal Corporations Act, 1882 (1), and under that section they can only make by-laws which prohibit the doing of something which is prohibited by the general law—*Strickland* v. *Hayes* (2)—or for the suppression of nuisances. Some limitation must be put upon the power given by s. 23. The council cannot by making a by-law constitute a new crime, or turn that which was before a lawful act into a punishable offence. Betting is not illegal, though using a house, office, room, or other place for the purpose of betting with persons resorting thereto is made illegal by 16 & 17 Vict. c. 119, s. 1. In *Partridge* v. *Mallandaine* (3) persons were held chargeable to the income tax in respect of profits derived from betting systematically carried on throughout the year; and in *Thwaites* v. *Coulthwaite* (4) an account of the profits of a partnership in a bookmaker's and betting business

(1) The Municipal Corporations Act, 1882 (45 & 46 Vict. c. 50), s. 23, sub-s. 1: "The council may, from time to time, make such by-laws as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough, and may thereby appoint such fines, not exceeding in any case five pounds, as they deem necessary for the prevention and suppression of offences against the same."

(2) Ante, p. 290.

(3) 18 Q. B. D. 276.

(4) [1896] 1 Ch. 496.

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was ordered. There is nothing illegal in using a street for betting. The by-law is too wide, and is open to the objections which were held to be good in *Strickland* v. *Hayes*. (1) The words are perfectly general, and would render liable to conviction two persons who met in the street and made a bet. The by-law contains no prohibition against the assembling for the purpose of betting, or creating an obstruction, so as to be within the power given by s. 23 of the Municipal Corporations Act, 1882, to make by-laws for prevention and suppression of nuisances. [He also referred to *Back* v. *Holmes*. (2)]

LORD RUSSELL of KILLOWEN C.J. In my judgment the magistrate's decision was wrong. I have before had occasion to make the observation—and I repeat it—that authorities cited on the construction of other by-laws are of very little use in assisting the Court to decide whether the particular by-law before them is, or is not, good. Each must be judged by its own language, and having regard to the circumstances to which it is addressed. As to the case of *Strickland* v. *Hayes* (1), I do not think that Lindley L.J., in the language he is reported to have used, can have meant to convey that a by-law made under the Municipal Corporations Act, 1882, can only prohibit an Act so far as the doing of that Act is created an offence by the general law; because that would be to reduce by-laws to mere machinery by which existing offences could be punished. If Lindley L.J. did mean that I greatly doubt whether he was right. The by-law in question here was made under s. 23 of the Act of 1882, which authorizes the council of a borough to make, from time to time, "such by-laws as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough." It was urged by the respondent's counsel that some limitation must be placed upon the power given by that section. It was said that the council cannot by making a by-law invent an entirely new crime—that they cannot turn into a criminal offence that which before was a lawful and innocent act. With

(1) Ante, p. 290. (2) 51 J. P. 692.

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Lord Russell C.J.

some of counsel's observations in that respect I quite agree; but we must consider what was the object of the particular by-law before us, and whether it is justified, having regard to the particular matter to which it is addressed, as being necessary or useful for the purposes of the good rule and government of the borough. Now, it clearly is not meant to apply to the case of men meeting casually in the street and making bets together, but it is meant to prevent persons, whose business is that of bookmaking and betting, from using streets or public places in the borough for the purpose of carrying on there their businesses of betting. It is to prohibit such persons from lying in wait near places of employment, public-houses, and the like, and in streets or places frequented by numbers of people, and from carrying on their business of betting there. It is to prevent that being done in places where annoyance would be likely to be caused to passers-by, where numbers of persons might probably assemble, and thus an inconvenient state of things arise, against the good rule and government of the borough. With those objects in view the by-law is made to run thus: [His Lordship read it.] I think it would be impossible under that by-law to convict in the case of persons who did not resort to the streets for the purpose of betting, but who merely, being in the streets, made bets. What it aims at is to prohibit—as using a house or place for the purpose of betting is already prohibited by law—persons from using the streets or public places of the borough in order to carry on the same business of betting there. If that be permitted to one person it must be permitted to a hundred persons, and the by-law, therefore, in my opinion, is one that could properly be made for the good rule and government of the borough. Our judgment must, therefore, be for the appellant, and the case must be remitted to the magistrate to convict.

WRIGHT J. I am of the same opinion. I only wish to add, with respect to such observations as are reported to have been made in *Strickland* v. *Hayes* (1) tending in the direction that a by-law can only deal with what is either prohibited by law or

(1) Ante, p. 290.

is a nuisance, that I think it may be well to reconsider that question.

Judgment for the appellant. Case sent back.

Solicitors for appellant: *Sharpe, Parker & Co., for H. Brevitt, Wolverhampton.*

Solicitors for respondent: *R. A. Willcock & Taylor, Wolverhampton.*

W. A.

BASSANO AND OTHERS *v.* BRADLEY AND OTHERS.

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May 4.

County Court—Jurisdiction—Arrears of Rent-charge—Action by Trustees of Charity—Prohibition—Title in Question—Charitable Trusts Act, 1853 (16 & 17 *Vict. c.* 137), *s.* 41—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 60.

The plaintiffs, trustees of a charity, sued in the county court to recover arrears of a rent-charge of 10*l.* a year issuing out of the defendants' land. The summons referred to the Charitable Trusts Act, 1853, and leave to proceed had been obtained under that Act.

On an application for a prohibition:—

Held, that the action was not "proceedings under this Act;" within the meaning of s. 41 of the Charitable Trusts Act, 1853, and therefore the jurisdiction of the county court was not excluded by that section:

Held, also, that the title which came in question, within the meaning of s. 60 of the County Courts Act, 1888, was the title to the rent-charge, not the title to the land, and therefore the value of the hereditaments in dispute did not exceed 50*l.* by the year, and the county court had jurisdiction.

APPLICATION by the defendants for a prohibition to the county court of Worcester holden at Dudley, to prohibit the hearing and determination of the action, on the ground that it was "proceedings under this Act," within the meaning of the Charitable Trusts Act, 1853 (1), s. 41, and therefore the county court had no jurisdiction; and also upon the further ground that the value of the hereditaments in dispute exceeded the sum of

(1) 16 & 17 Vict. c. 137. By s. 41, "No judge of the Court of Chancery, nor any district court of bankruptcy or county court, shall upon any proceedings under this Act have jurisdiction to try or determine the title at law or in equity to any real or personal property, or any term or interest therein, as between any charity, or the trustee thereof, and any person holding or claiming such real or personal property, term or interest, adversely to such charity. . . ."

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50*l.* by the year, within the meaning of the County Courts Act, 1888 (1), s. 60, and therefore the county court had no jurisdiction.

The action was brought by the plaintiffs, who were trustees of a charity, to recover certain money alleged to be due to them, as such trustees, in respect of arrears of a rent-charge of 10*l.* a year issuing out of the land of the defendants. The summons by which the action was commenced referred to the Charitable Trusts Act, 1853, and leave had been obtained, under s. 17 of that Act, to bring the action.

Bosanquet, Q.C. (*Hickey* with him), for the plaintiffs, shewed cause. The county court has jurisdiction to hear and determine this action, and the defendants' application must fail on both grounds.

In the first place the Charitable Trusts Act, 1853, has no application to the case. The action is merely an action to recover a debt, and is not "proceedings under this Act," within the meaning of s. 41, and therefore that section can have no effect in the way of excluding the jurisdiction of the county court. It is true that the summons by which the action was commenced refers to the Charitable Trusts Act, and leave to proceed was obtained under s. 17, but all that is immaterial, and may be rejected as surplusage. It appears to have been done by mistake, or through overcaution, for the leave to proceed is clearly unnecessary: *Rendall* v. *Blair*. (2)

[LORD RUSSELL of KILLOWEN C.J. The Charitable Trusts Act is an administrative Act, and it seems difficult to see how it can apply to an ordinary civil action.]

Secondly, there is nothing in the County Courts Act, 1888, which can have the effect of excluding the jurisdiction of the county court. The defendants deny the plaintiffs' right to the rent-charge, and therefore the title to the rent-charge comes

(1) 51 & 52 Vict. c. 43. By s. 60, "A judge shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question, where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of 50*l.* by the year. . . ."

(2) 45 Ch. D. 139.

in question; but the plaintiffs make no claim to the defendants' land, and therefore the title to the land does not come in question. The rent-charge is an incorporeal hereditament, the value of which does not exceed 50*l.* by the year, and the title to which comes in question. It follows that the county court has jurisdiction under s. 60 of the County Courts Act, 1888.

[LORD RUSSELL of KILLOWEN C.J. referred to *Stolworthy* v. *Powell.* (1)]

A. T. Lawrence, for the defendants, in support of the application. This action is a proceeding under the Charitable Trusts Act, 1853, being brought by the trustees of the charity for the benefit of the charity, and the result is that the jurisdiction of the county court is excluded by s. 41. The plaintiffs have themselves treated the case as coming under the Act, by referring to the Act in the summons, and obtaining leave to proceed, and they cannot now be heard to say that the Act has no application.

The true effect of the dispute is that the plaintiffs' interest in their land is attacked, and therefore the title to their land, the value of which exceeds 50*l.* a year, comes in question, and the jurisdiction of the county court is expressly excluded by s. 60 of the County Courts Act, 1888.

[WRIGHT J. Is not the best way to put it, that the rent-charge issues out of, and affects, the whole of the land?]

Yes; and therefore the title of the defendants to an interest in the whole of the land comes in question.

LORD RUSSELL of KILLOWEN C.J. In this case the defendants seek to prohibit the county court from entertaining the action brought against them by the plaintiffs. Two grounds have been urged on the defendants' behalf as shewing that the county court has no jurisdiction. The first contention is that this action is a proceeding under the Charitable Trusts Act, 1853 (16 & 17 Vict. c. 137), and therefore the jurisdiction to try it is expressly excluded by s. 41 of that Act. No doubt some warrant for that contention is afforded by the course which the plaintiffs have themselves adopted; for they have referred to

(1) 55 L. J. (Q.B.) 228.

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the Act in their summons, and they have obtained leave to proceed under s. 17. That gives some colour to the defendants' contention; but, as I am clearly of opinion that the Charitable Trusts Act, 1853, has no relation to the case at all, I think the plaintiffs are not barred from shewing the truth because they have inaccurately referred to that Act.

The second ground on which the defendants rely is more serious. It depends on s. 60 of the County Courts Act, 1888 (51 & 52 Vict. c. 43). I am not absolutely satisfied that the construction which I have adopted is the right one; but the onus lies on the defendants, who are attacking the jurisdiction of the county court, and they have not satisfied me that their view as to the meaning of the section is correct. It is important to observe that the section gives jurisdiction "where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed" 50*l.* a year. Those words "rent payable in respect thereof" cannot be read as applicable to incorporeal hereditaments; therefore in dealing with incorporeal hereditaments we are thrown back on the earlier words, "the value of the lands, tenements, or hereditaments in dispute." In the present case the hereditament in dispute is the rent-charge, and the value does not exceed 50*l.* a year. If the defendants could shew that the title to the land came in question, their contention would be well founded; but the plaintiffs' claim is to the right to an incorporeal hereditament issuing out of the land, and it is the title to that which comes in question, and not the title to the land. As to the case of *Stolworthy* v. *Powell* (1), which has been referred to, I will only say that I should desire very seriously to consider that decision before assenting to it; and I do not pray it in aid in deciding the present case, but I rest my decision on the ground that the defendants have not satisfied me that their view as to the effect of s. 60 of the County Courts Act, 1888, is correct.

WRIGHT J. I am of the same opinion, but subject to the same doubt as has been expressed by the Lord Chief Justice.

(1) 55 L. J. (Q.B.) 228.

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I think that the title which comes in question in the present case is the title to an incorporeal hereditament, namely the rent-charge, and the title to the land does not come in question.

Application refused.

Solicitors for plaintiffs: *Field, Roscoe & Co., for Watts & Jobson, Dudley.*

Solicitors for defendants: *Tucker, Lake & Lyon, for Docker & Tarleton, Birmingham.*

P. B. H.

1896

March 26.

In re AN ARBITRATION BETWEEN HAIGH AND THE LONDON AND NORTH WESTERN AND GREAT WESTERN RAILWAY COMPANIES.

Arbitration—Umpire—Misconduct—Bias.

It is not necessarily an objection on the ground of bias to the award of an umpire in an arbitration under the Lands Clauses Consolidation Acts to determine the value of land compulsorily taken that, during the pendency of the arbitration and before making his award, he has given evidence on behalf of one of the parties in another inquiry as to the value of other land taken for the same purposes and under the same parliamentary powers.

MOTION to set aside the award of the umpire in an arbitration under the Lands Clauses Consolidation Acts. The substantial grounds alleged in the notice of motion were—(1.) that the umpire was not an indifferent and disinterested person with regard to the subject-matter of the reference; (2.) that he misconducted himself and acted improperly in the reference in that, subsequently to his appointment and during the pendency of the arbitration proceedings and before making his award, he accepted a retainer from the above-named companies to act as their witness, and, in fact, gave sworn evidence on their behalf, in another arbitration in respect of land of a similar character, and in close proximity to the land of the claimant, which land was being acquired by the companies under the same powers and for the same purposes as the claimant's land. From the affidavits the following facts appeared:—

On January 23, 1895, the respondents gave to the claimant notice to treat in respect of certain of his land which was required by them for the purpose of widening their line of railway.

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In re HAIGH AND L. & N. W. AND G. W. RY. COMPANIES.

Arbitrators were appointed in May, and in June the name of Mr. Cross, who had been suggested as umpire by the arbitrator appointed by the respondents, was accepted by the claimant's arbitrator, and he was duly appointed umpire. The hearing took place on December 3 and 4, and on December 21 the umpire published his award. Prior to the hearing Mr. Cross, the umpire, had been retained by the respondents as a witness for them in another inquiry as to the value of certain land belonging to one Green, which was situate about three miles (1) from Haigh's land, and which was being taken by the respondents for the same purpose and under the same Act of Parliament. On December 13 and 14, before the award was made in Haigh's case, the arbitration in Green's case was held, when Mr. Cross gave evidence on behalf of the respondents as to the value of Green's land. Mr. Haigh, the claimant, being dissatisfied with the amount awarded, now moved to set aside the award on the above grounds.

J. W. Mansfield (*Bigham, Q.C.*, with him), for the claimant. It was impossible under the circumstances for the umpire to approach the consideration of the value of this land free from bias, he having during the pendency of the arbitration acted as a witness on behalf of one of the parties in another case relating to similar land in the vicinity which was being taken for the same purpose. It is true that such an objection, though a proper one in itself, may be waived by the conduct of the party: *Clout* v. *Metropolitan Ry. Co.* (2); but there is no suggestion of a waiver in the present case.

H. D. Greene, Q.C., and *C. A. Russell*, for the respondents, and *Rowlatt*, for the umpire, were not called upon.

DAY J. I am of opinion that this application, in which there are no merits, must be dismissed. I cannot suppose that the mind of the arbitrator was substantially affected by the fact that he gave evidence on behalf of one of the parties in a somewhat similar matter. It is within the knowledge of us all that surveyors are constantly acting either as umpires or as witnesses in cases of this description, and I am satisfied that if the parties

(1) The distance was variously given as from one and a half to three miles.

(2) 46 L. T. 141.

to such an arbitration require a qualified umpire in Liverpoo. who is also a surveyor they will not be able to avoid choosing a man who is frequently a witness in these cases. It is necessary that the umpire should be acquainted with the value of land, and the necessity of the case leads to the employment of surveyors as umpires.

WRIGHT J. I am of the same opinion, although I own to feeling more doubt than my brother Day upon the matter; on the whole, however, I think that the objection on the ground of bias is not made out. The case is not put as one in which the umpire was disqualified by reason of interest, but merely as one of bias; and the only ground suggested for the charge is that he was a witness for the railway companies in another arbitration as to the value of some land which appears to have been about a mile and a half away. I do not think that the applicant has sufficiently made out that because of this fact the umpire was likely to be biassed in this arbitration, he being a man of the highest standing, against whom personally no attack is made. I think that there is no such necessary incompatibility between his position as a witness and an umpire as would justify us in saying that he could not act in the latter capacity in a different inquiry to that in which he appeared as a witness, although he obviously could not act in both capacities in the same inquiry. I do feel, however, that it is very desirable that persons who are asked to act as umpires in such cases should inform the parties or their arbitrators of any facts which might prevent their assenting to their acting as umpires.

Rowlatt, for the umpire, asked for costs.

DAY J. We think he is entitled to costs; he was bound to appear in order to protect his character.

Motion refused.

Solicitors for applicant: *Pritchard, Englefield & Co., for Simpson, North & Co., Liverpool.*

Solicitor for respondents: *C. H. Mason.*

Solicitors for umpire: *Woodcock, Ryland & Parker, for Holden & Holden, Bolton.*

W. J. B.

1896
April 25.

[CROWN CASE RESERVED.]

THE QUEEN *v.* HOPKINS AND FERGUSON.

Criminal Law—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 13, *sub-s.* 2—*Intent to defraud Creditors.*

A plaintiff in an action to recover unliquidated damages is not until recovery of judgment a "creditor" of the defendant within the meaning of s. 13, sub-s. 2, of the Debtors Act, 1869, which makes it a misdemeanour for any person to make any gift, delivery, or transfer of or any charge upon his property with intent to defraud his creditors or any of them.

A defendant to such an action, who has, during the pendency of the action but before judgment, given a bill of sale over his furniture with intent to defeat any judgment which the plaintiff may obtain, cannot therefore be convicted under that sub-section of having made a charge on his property with intent to defraud the plaintiff in the action.

CASE stated by the recorder of Manchester, from which the following facts appeared :—

William Hopkins and George Ferguson were jointly indicted in respect of an offence against s. 13, sub-s. 2, of the Debtors Act, 1869. (1) The first count charged them with having on October 8, 1894, unlawfully and with intent to defraud one Annie Copeland, a creditor of the said William Hopkins, made a charge on the property of the said William Hopkins, to wit, a bill of sale of all the household furniture and other effects of the said William Hopkins then being in and upon certain premises. The second count charged the commission of the same offence by Hopkins, aided and abetted by Ferguson.

At the hearing it was proved that on October 8, 1894, an action to recover damages for breach of promise of marriage was pending between Annie Copeland as plaintiff and the said Hopkins as defendant, and that judgment in the action was, on November 2, 1894, given for the plaintiff for 25*l.* and costs. On

(1) By 32 & 33 Vict. c. 62, s. 13, "Any person shall in each of the cases following be deemed guilty of a misdemeanour, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour; that is to say, ... (2.) If he has with intent to defraud his creditors, or any of them, made or caused to be made any gift, delivery, or transfer of or any charge on his property."

October 8, 1894, Hopkins made and executed in favour of Ferguson a bill of sale of all his household furniture and other effects at the address given in the bill of sale; at the time of the making of the bill both Hopkins and Ferguson had the intent to defeat any judgment and execution which the said Annie Copeland might thereafter obtain in her said action. At the close of the case for the prosecution it was objected on behalf of the defendants that, inasmuch as at the time of the granting of the bill of sale Annie Copeland had not recovered judgment in her action against Hopkins, she was not then a creditor of Hopkins within the meaning of s. 13, sub-s. 2, of the Debtors Act, 1869. The objection was overruled, and, the jury having found a verdict against both prisoners, sentence was postponed pending the decision of the Court on the present case.

The question for the opinion of the Court was whether the learned recorder was right in holding that Annie Copeland was on October 8, 1894, a creditor of Hopkins within the meaning of the above sub-section. (1)

Cosmo Rose Innes, for Hopkins, was stopped by the Court after reading the case.

C. A. Russell, for Ferguson, was not called upon to argue.

M'Keand, for the prosecution. The decision was right. The prosecutrix was at the date of the bill of sale a creditor of Hopkins within the meaning of 13 Eliz. c. 5. In *Barling* v. *Bishopp* (2) a defendant, after notice of trial in an action of trespass, made a voluntary conveyance of real estate to his daughter, and it was held that the conveyance, having for its object to defraud future creditors, was void under that statute. Sect. 13, sub-s. 2, of the Debtors Act, 1869, applies to an intent to defraud future, as well as present, creditors.

LORD RUSSELL of KILLOWEN C.J. There can be no doubt as to what our decision should be in the present case. It is unnecessary to make any observations as to the peculiarities of

(1) Other points were raised in the case, which it is unnecessary to set out in this report, the argument and the decision of the Court having proceeded solely upon the point here reported.

(2) 29 Beav. 417.

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the different counts in the indictment, for the simple point for our determination, and by which this conviction must stand or fall, is whether the prosecutrix was, within the meaning of s. 13, sub-s. 2, of the Debtors Act, 1869, a creditor of the defendant at the time when this bill of sale was given by him. In my judgment it is perfectly clear that she was not. She had brought an action for breach of promise of marriage against him, in which she might or might not succeed—in other words, she had a cause of action against him at that date which after the execution of the bill of sale might, and in the event did, mature into a judgment. Indeed, even if the prosecutrix had obtained a verdict in her favour when the bill of sale was given, but had not signed judgment, she would not have been a creditor of the defendant. *Jones* v. *Thompson* (1) is an authority for that proposition. This is enough to dispose of the case, for if Hopkins could not be convicted of this offence, neither could Ferguson be convicted of aiding and abetting him. The conviction must be quashed.

POLLOCK B. and HAWKINS and CAVE JJ. concurred.

WILLS J. I am entirely of the same opinion, and only desire to add that even in cases arising under 13 Eliz. c. 5, which statute was referred to by the counsel for the prosecution, a narrower construction has been placed on those portions which deal with criminal matters and the criminal law than upon those which deal with civil rights and remedies. (2)

Conviction quashed.

Solicitor for the prosecution: *Solicitor to the Treasury.*

Solicitor for defendant Hopkins: *Millar, Manchester.*

Solicitor for defendant Ferguson: *Kirkman, for W. Thomson, Manchester.*

(1) E. B. & E. 63.

(2) See *Jones* v. *Boulter*, 1 Cox, 288.

W. J. B.

COMMISSIONERS OF POLICE *v.* CARTMAN.

1896
April 21.

Licensing Acts—Offences—Sale to Drunken Person—Sale by Servant contrary to Instructions—Licensing Act, 1872 (35 & 36 *Vict. c.* 94), *s.* 13.

The Licensing Act, 1872, s. 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. The respondent, a licensed person, gave orders to his servants that no drunken persons were to be served; during his absence one of his servants sold intoxicating liquor to a drunken person:—

Held, that the respondent was guilty of an offence under the section for he was liable for the act of his servant, that act having been done by the servant within the general scope of his employment, although contrary to the orders of his master.

CASE stated by a metropolitan police magistrate.

The respondent had been summoned for that he, being a licensed person, did on October 14, 1895, unlawfully sell intoxicating liquor to a drunken person, contrary to 35 & 36 Vict. c. 94, s. 13. It appeared that at 11.45 P.M. a man named Evans, who was undoubtedly drunk, entered the respondent's public-house; that a police constable called the attention of the door porter to the fact that the man was drunk; that the porter spoke to the barman, who drew and placed a glass of beer before Evans, who took and paid for it; that the porter took it from his hand and placed it before the barman, who replaced it before Evans, who again took it and drank it up. The police constable thereupon said to the barman, "You could see that he was drunk"; to which the barman replied, "If you saw that he was drunk why did you not put him out?" The respondent, who was not present, was sent for by the constable, and on making his appearance he inquired of the porter why he had admitted the drunken man; upon which the porter replied, as the fact was, that he had spoken to the barman twice. The respondent was called and stated that at the time of the occurrence he was a considerable distance away and out of sight of the bar, and that he had given precise instructions to the door porter and the barmen to refuse drink to drunken persons, or to persons in a state of semi-intoxication.

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The learned magistrate was of opinion that as the respondent was not present and was ignorant of the act of his barman, and as there had been no delegation of authority to the barman to supply drink to a drunken person, but, on the contrary, he had been prohibited from doing so, and as the door porter, who was equally in charge of the premises with the barman, had exercised his authority in endeavouring to prevent the supply of drink to Evans, he was not guilty of the offence charged against him, and dismissed the summons.

The question for the opinion of the Court was whether the learned magistrate was bound to convict upon the authority of *Cundy* v. *Le Cocq* (1) and *Bond* v. *Evans* (2), or whether he was at liberty to take into consideration the circumstances stated in the case, as the circumstances were considered in *Somerset* v. *Hart*. (3)

Danckwerts, for the appellants. The respondent should have been convicted. The prohibition against selling intoxicating liquor to a drunken man contained in s. 13 of the Licensing Act, 1872, is absolute; even knowledge of the condition of the person served is unnecessary to constitute the offence: *Cundy* v. *Le Cocq*. (1) A licensed person is liable for the acts of his servant done within the general scope of his employment; he cannot get rid of the duty cast upon him by law by delegating the performance of it to some one else. The only person who can be punished, if a drunken person is served with the intoxicating liquor, is the licensed person himself; and it would be contrary to the public interest if he could rid himself of his liability by merely giving general instructions to his servants that drunken persons were not to be served. [He was stopped by the Court. He also cited *Reg.* v. *Stephens* (4); *Bond* v. *Evans* (2); *Sherras* v. *De Rutzen* (5); *Crabtree* v. *Hole*. (6)]

S. Lynch, for the respondent. The decision of the magistrate was right. Admitting that it is a possible construction of the section to hold that it amounts to an absolute prohibition

(1) 13 Q. B. D. 207.
(2) 21 Q. B. D. 249.
(3) 12 Q. B. D. 360.
(4) L. R. 1 Q. B. 702.
(5) [1895] 1 Q. B. 918.
(6) 43 J. P. 799.

of the sale of intoxicating liquor to a drunken person not only by the licensed person himself, but also by his servants acting within the scope of their employment, nothing more than a primâ facie case is raised against the licensed person where the sale is by his servant, which may be rebutted by the surrounding circumstances. Here the rebuttal is complete, for the facts shew that the sale was not only not within the general scope of the barman's employment, but that it was contrary to the respondent's express instructions. [He cited in adddition *Newman* v. *Jones* (1); *Somerset* v. *Hart*. (2)]

LORD RUSSELL of KILLOWEN C.J. The question for our determination is whether the magistrate was bound to convict the respondent of the offence of selling intoxicating liquor to a drunken person contrary to the provisions of s. 13 of the Licensing Act, 1872. The learned magistrate believed that the respondent bonâ fide gave instructions to his barman that no drunken persons should be served, and that he intended those instructions to be acted upon; but the question is whether that fact affords any answer to the charge. In considering this question, we must see what is the object of the Act, and how far that object would be effected or defeated if the construction contended for by the respondent were given to this section. There can be no question as to the object of this section: it was intended in the interest of public order to prevent the sale of intoxicating liquors to drunken persons. It must be remembered that the persons from whom alone intoxicating liquors can be obtained are licensed persons: how do they carry on their business? From the nature of the case it must be largely carried on by others on their behalf; it is true that sometimes the licensee keeps in his own hands the direct control over his own business, but in the great majority of cases it is not so, the actual direct control being deputed to other persons: are the licensees in these latter cases to be liable under this section for the acts of others? In my opinion they are, subject to this qualification, that the acts of the servant must be within the scope of his employment. The scope of the manager's

(1) 17 Q. B. D. 132. (2) 12 Q. B. D. 360.

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authority in my view receives its limitation from the scope of his employment: authority is given him to do all acts within the scope of his employment. It makes no difference for the purposes of this section that the licensee has given private orders to his manager not to sell to drunken persons; were it otherwise, the object of the section would be entirely defeated. We may take as an illustration the case of a sporting publican who attends race-meetings all over the country, and leaves a manager in charge of his public-house; is it to be said that there is no remedy under this section if drink is sold by the manager in charge to any number of drunken persons? It is clear that there is no machinery by which the person actually selling can be convicted; a penalty can only be inflicted on the licensee. It is impossible for us to place upon the section the narrow construction suggested. In one sense the case is upon the confines of a criminal offence; but, apart from authority, which is absolute, I think it was intended that the responsibility should be upon the licensee for acts done by an employee within the scope of his authority. The authorities chiefly relied on for the respondent have, I think, no bearing on the case; they relate to gaming, and it cannot be contended that a barman, as part of his implied authority, has power to sanction the carrying on of gaming on his master's premises. I may add that there is no real hardship in this case; for if the magistrate was convinced that the respondent honestly intended to comply with the law, he would take that into account and impose only a small fine, and could also abstain from ordering the conviction to be indorsed on the licence. It would be of very evil consequence if we were obliged to hold that the respondent was not guilty of the offence charged. The case must go back to the learned magistrate.

WRIGHT J. concurred.

Solicitors for appellants: *Wontner & Sons.*
Solicitor for respondent: *G. P. R. Burgess.*

W. J. B.

[IN THE COURT OF APPEAL.]

C. A.

1896

March 31

May 6.

THE QUEEN *v.* JUSTICES OF LONDON.

Poor-rate—Valuation List—Appeal—Clerk of Assessment Committee—Right of Audience—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 62.

The provision in s. 62 of the Valuation (Metropolis) Act, 1869, that on an appeal against a valuation list "an assessment committee . . . . may appear . . . . by their clerk" does not give the clerk a right to be heard on their behalf for the purpose of consenting to an alteration in the list.

MANDAMUS to the justices of the county of London to allow the assessment committee of the parish of St. Mary, Islington, to appear by their clerk upon an appeal against a valuation list under the Valuation (Metropolis) Act, 1869, to consent to an alteration in the said valuation list.

Messr. T. R. Roberts, Limited, gave notice of appeal under the Valuation (Metropolis) Act, 1869, to the Court of Quarter Sessions for the county of London against an assessment of their premises, Nos. 216 to 225, Upper Street, in the parish of St. Mary, Islington, which assessment had been affirmed by the assessment committee of the parish in their quinquennial valuation list at 4000*l.* gross and 3334*l.* rateable values respectively. The appeal was duly entered in the list for hearing at the sittings of the quarter sessions commencing on February 8, 1896. Previously to the said February 8, terms had been arranged between the assessment committee and the appellants by which it was agreed that the assessment should be reduced in the valuation list to 3500*l.* gross and 2917*l.* rateable values respectively, and that the necessary alterations should be made in the list. Previously to February 8 William Francis Dewey, the clerk to the assessment committee, had been instructed by the committee to appear before the Court of Quarter Sessions to consent to the alterations in the valuation list so agreed upon. The said W. F. Dewey is not a counsel. In pursuance of such instructions he appeared before the Court of Quarter Sessions and stated that the above-mentioned settlement had been arrived at, and asked that the valuation list might be amended

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accordingly. The Court inquired who appeared on behalf of the assessment committee to consent. On being informed that W. F. Dewey was, as clerk to the committee, instructed to appear and consent on their behalf, the Court refused to hear him or to accept his consent, holding themselves bound by their order of March 31, 1890, made under s. 27 of the Valuation (Metropolis) Act, 1869, by rule 10 of which order it is provided that "consents shall be signified by counsel in open court." It was contended before the quarter sessions that s. 62 of the Valuation (Metropolis) Act, 1869, which empowers an assessment committee to "appear on any appeal by their clerk," entitled the clerk to appear in court and give the necessary consent on behalf of the committee; but the Court overruled that contention. The said W. F. Dewey thereupon applied for and obtained a rule for a mandamus to the justices to allow him to appear on behalf of the committee and consent to the alteration in the valuation list according to the terms agreed.

Sir E. Clarke, Q.C., and *Avory*, for the justices, shewed cause against the rule. It is a well-recognised rule that all judicial tribunals have power to regulate their own practice. A Court if it thinks fit may give exclusive audience to one particular class of advocates: *Ex parte Evans* (1); or it may refuse to hear any one except the litigant parties themselves: *Collier* v. *Hicks*. (2) In that latter case it was held that no one has a right to appear as an advocate before justices of the peace in petty sessions without their permission. The law has in that respect now been altered by statute. Sect. 12 of Jervis's Act (11 & 12 Vict. c. 43) provides that a party to an information or complaint is entitled to be heard by counsel or attorney. But, except so far as it has been taken away by statute, the discretion of a Court to regulate its own procedure is absolute. This inherent power of all Courts to determine whether they will hear any and what advocates has been frequently recognised by the Legislature. For instance, s. 72 of the County Courts Act, 1888, which gives an express statutory right to a party to an action to be heard by counsel or solicitor, provides that no other

(1) 9 Q. B. 279. (2) 2 B. & Ad. 663.

person shall appear as an advocate on behalf of a party except by leave of the judge. The section of the Valuation (Metropolis) Act, 1869, s. 62, upon which the prosecutor in the present case relies, does not give the clerk of the assessment committee any right of audience. The object of that section was that, as the clerk was not required to be a solicitor, he might do what a solicitor might do, and appear in the same way that a solicitor appears for a client, and instruct counsel himself without going to the expense of employing a solicitor for that purpose. The word "appear" does not necessarily mean that the person appearing is to be heard in court. In the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), it is enacted by s. 123 that the county council "may appear before any court" by their clerk. Those words would include the High Court, and it could not be suggested that the Act intended the clerk to have a right of audience in the High Court. Where the Legislature have intended a person to have a right of audience on behalf of another, they have used apt words for the purpose. Thus, in the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), s. 68 provides that the clerk or other officer of a board of guardians may "conduct any proceedings" on behalf of the board before any justices of the peace. In *Reg.* v. *Assessment Committee of St. Mary Abbotts, Kensington* (1), a person who objected to a valuation list claimed to be heard before the assessment committee by an agent who was not a member of the legal profession. It was held that the committee were compellable to hear the agent; but that decision turned upon the fact that the committee were not a judicial tribunal whereas the quarter sessions are indisputably a court.

Secondly, apart from the common law right of the sessions to regulate their own procedure—a right which in the present case remains unaffected by statute—there is an express statutory power to make rules as to proceedings on appeals given by s. 27 of the Valuation (Metropolis) Act, 1869. Under that power a rule has been made that "consents shall be signified by counsel in open court." It was in contravention of that rule that the prosecutor in the present case claimed to act.

(1) [1891] 1 Q. B. 378.

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T. Willes Chitty, in support of the rule. The clerk here did not claim to appear as agent or advocate on behalf of the assessment committee, but as the assessment committee itself—in other words, as a litigant in person. The effect of s. 62 of the Act of 1869 was to substitute the clerk for the committee for the purpose of proceedings on appeal, and to enable him to do everything that the committee might have done themselves. If all the individual members of the committee had insisted upon appearing in court, they would all have been entitled to be heard, for every litigant in person has an absolute right of audience. The clerk as their substitute has a similar right. The word "appear" in connection with an appeal against a valuation list can have no meaning except that of appearing in court and being heard, for upon such appeal there is no such thing as an entry of appearance. The cases cited are all cases in which the person claiming to be heard did so as agent for the party, not as the party himself.

DAY J. I am clearly of opinion that this rule should be discharged. There is no doubt whatever that all Courts have a discretion as to whom they will hear on behalf of parties to proceedings before them, unless that discretion has been taken away by statute. It has not been disputed that the quarter sessions, when exercising the jurisdiction of the general assessment sessions under the Valuation (Metropolis) Act, 1869, is a Court for this purpose. But it has been contended that the absolute discretion which they would otherwise have with respect to the persons whom they would hear was cut down by s. 62 of the Valuation (Metropolis) Act, 1869, which provided that on appeals against valuation lists under that Act an assessment committee might appear by their clerk; and it was argued that the effect of that provision was to substitute the clerk for the assessment committee for the purposes of the appeal, and to give him the status of a litigant in person, and consequently to entitle him to personally conduct the proceedings on the assessment committee's behalf. But I am of opinion that that is not the effect of that section. What was there intended was to provide a simple means of bringing the

committee, which is not a corporate body, before the Court, and to do away with the necessity which would otherwise exist of serving notice of appeal upon the individual persons of whom the committee was composed. On notice of appeal being given to the clerk he may appear as representing the committee, but he only appears in the sense in which a solicitor appears in the High Court on behalf of a client—that is to say, by appearing he brings the committee before the Court so as to preclude them from afterwards alleging that they were not parties to the appeal and had not an opportunity of being heard. But he does not appear in any other sense, and has no right of audience upon the appeal. This was the view that was taken of the Act by the framers of the Rules of March, 1890, rule 10 of which provided that all consents should be signified by counsel. I see no ground for the contention that that rule was ultra vires.

LAWRANCE J. I am of the same opinion.

Rule discharged.

J. F. C.

The applicant for the mandamus appealed.

May 6. *T. Willes Chitty*, for the applicant. The rule made by the justices was ultra vires, if the effect of s. 62 is as contended for by the applicant. It is submitted that the object of the section is to enable the assessment committee, if so minded, to exercise the ordinary right of a litigant to appear and be heard in person through their clerk. Unless the clerk is entitled to be heard, as he now claims to be, no effect whatever can be given to the section.

Sir E. Clarke, Q.C., and *Avory*, for the justices, were not called upon.

LORD ESHER M.R. The language of the section relied upon is obviously legal language which relates to the ordinary exigencies of a litigation. Litigants must appear before a Court before the Court can deal with them. After they have so appeared, then there are various proceedings which have to be

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gone through before the Court can determine the case. The section provides that "every assessment committee, with the consent of the guardians, and every overseer, with the consent of the vestry of his parish, may, for the purposes of any application for a valuation on any appeal, give security for paying the costs of such valuation. An assessment committee may give such security and may appear on any appeal by their clerk and shall indemnify the said clerk against all moneys, losses and costs paid or incurred by him in consequence of such security or appearance." The security referred to has to be given upon the appeal after the assessment committee have appeared in court. The object of the section appears to me to be that, instead of its being necessary for the individual members of the committee to appear in court, the clerk may appear for all of them. With regard to the proceedings which are subsequently to take place upon the appeal, the justices have made rules for the purpose of regulating them under s. 27, one of which is to the effect that consents shall be signified by counsel in open court. That is a rule which, in my opinion, they were entitled under the statute to make, and which is not ultra vires. It is not necessary to say exactly what the clerk may or may not do under s. 62, but I do not think it entitles him to be heard as contended in this case. That being so, I think this appeal must be dismissed.

A. L. SMITH L.J. I am of the same opinion. The justices have made a rule to the effect that consents on appeals against the valuation list must be signified by counsel in open court. It is contended that that rule is ultra vires on the ground that s. 62 of the Act entitles the clerk not only to appear but to be heard on behalf of the assessment committee. That is not my reading of the section. I think it merely provides for the manner in which the assessment committee are to get into court. As the Master of the Rolls has pointed out, there must in a legal proceeding be some means by which the defendant, or party against whom the proceeding is taken, may come before the Court before the litigation can proceed. The assessment committee being a very numerous body, it would be very incon-

venient that the members of it should be obliged to appear in court individually. Therefore the section provides that they may do so by their clerk; but it does not provide that, when there, they may be heard by their clerk. That being so, I think the rule made by the justices was not ultra vires, and this appeal must be dismissed.

RIGBY L.J. I am of the same opinion. Whatever the exact meaning of s. 62 may be, I do not think that it entitles the clerk to the assessment committee to act as their counsel. Therefore, unless it can be shewn that the rule made by the justices as to consents is ultra vires, the appellant must fail, and it is not necessary to consider exactly what in other respects the clerk to an assessment committee is empowered to do under s. 62. I do not see any ground for thinking that the rule is ultra vires.

Appeal dismissed.

Solicitor for assessment committee: *A. M. Bramall.*
Solicitor for justices of London: *E. W. Beal.*

E. L.

THE QUEEN *v.* LEWIS AND MOSS.

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May 1.

Volunteer Corps—Power to make Rules—Failure of Volunteer to become efficient—Loss of Capitation Grant—Rule ultra vires—Volunteer Act, 1863 (26 & 27 *Vict. c.* 65), *s.* 24.

By s. 24 of the Volunteer Act, 1863, "The officers and volunteers belonging to a volunteer corps may from time to time make rules for the management of the property, finances, and civil affairs of the corps."

A volunteer corps made (inter alia) the following rule: "Any . . . . member of the corps who shall fail to make himself efficient and to earn the Government capitation grant . . . . shall pay to the funds of the corps a sum equal to the amount of Government capitation grant which he has in consequence failed to earn":—

Held, that there was no power under the section to make such a rule, and that it was therefore ultra vires.

RULE NISI for a mandamus to the stipendiary magistrate of Cardiff to hear and determine the application of one Alfred

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Thornley, the officer commanding the Severn Volunteer Division, Royal Engineers, for a summons, upon an information on behalf of the said commanding officer, against one John Moss, for that he, being a person belonging to a volunteer corps, did unlawfully neglect to pay the sum of 5*l.* undertaken to be paid by him to the funds of the corps, and due under the rules of the corps, and actually payable by him.

It appeared that Moss was a member of the Severn Volunteer Division, Royal Engineers, and that he had failed to make himself efficient and to earn the Government capitation grant, which would have amounted to the sum of 5*l.* By the rules of the corps, which had been approved by the War Office, "Any officer or other member of the corps who shall fail to make himself efficient and to earn the Government capitation grant, either by reason of his resigning or having been dismissed for misconduct, neglect of duty, or for other sufficient cause, or by failing to fulfil the requirements laid down by the regulations in force at the time, shall pay to the funds of the corps a sum equal to the amount of Government capitation grant which he has in consequence failed to earn." The commanding officer caused an information to be laid, and applied for a summons to be issued upon it against Moss; but he was refused, the stipendiary magistrate holding that the summons could only be issued on complaint, and not on information.

The commanding officer then obtained this rule nisi, which now came on for argument.

No counsel appeared to shew cause against the rule; but the stipendiary magistrate filed an affidavit in which he stated that he was of opinion that the sum alleged to be due from Moss was a civil debt, and not a penalty recoverable on information, and that Moss ought to have been summoned upon complaint.

Bailhache, in support of the rule. The case is governed by the Volunteer Act, 1863 (26 & 27 Vict. c. 65). By s. 11 the requisites of efficiency are from time to time to be declared by an Order in Council; and by s. 24, "The officers and volunteers belonging to a volunteer corps may from time to time make

rules for the management of the property, finances, and civil affairs of the corps, and may alter and repeal any such rules." That was the power under which the rule in question was made. It deals with the finances and civil affairs of the corps. Then by s. 27, "If any person belonging or having belonged to a volunteer corps . . . . neglects or refuses to pay any money . . . . due under the rules of such corps and actually payable by him, or to pay any fine incurred by him under the rules of such corps, such money or fine shall . . . . be recoverable from him . . . . as a penalty under this Act is recoverable." By s. 48 any money or fine by this Act made recoverable as a penalty under this Act may be recovered in England in a summary way before two or more justices of the peace in manner directed by 11 & 12 Vict. c. 43. It is submitted, therefore, that the non-payment of this money is an offence (as, indeed, it is called in s. 48) for which there can be a conviction and that it falls under s. 5 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), and is not a civil debt recoverable on complaint under s. 6 of that Act. The case of *Reg.* v. *Kerswill* (1) is therefore distinguishable.

LORD RUSSELL of KILLOWEN C.J. This case seems to me of importance, and I could have wished that we had had the advantage of hearing counsel against the rule. I do not feel entirely satisfied with the judgment I am about to pronounce, but this is the view that I take. In order to give effect to the rules of this corps it is necessary that it should be shewn that they were made under statutory authority. The rule in question says: "Any . . . . member of the corps who shall fail to make himself efficient and to earn the Government capitation grant . . . . shall pay to the funds of the corps a sum equal to the amount of Government capitation grant which he has in consequence failed to earn." It is said that under ss. 27 and 48 of the Volunteer Act, 1863, these sums are recoverable as penalties under s. 1 of the Summary Jurisdiction Act, 1848, and that the non-payment of such sums is, therefore, an offence for which an information will lie, and for which the volunteer can

(1) [1895] 1 Q. B. 1.

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be convicted and imprisoned. But, in my opinion, s. 24 of the Volunteer Act, 1863, under which these rules are made, gives no authority for the making of such a rule. That section runs thus: "The officers and volunteers belonging to a volunteer corps may from time to time make rules for the *management* of the property, finances, and civil affairs of the corps." It does not seem to me that the rule here in question falls under any of those heads. It creates an offence by members of the corps, and provides for the payment of a sum which will increase the finances of the corps. I do not think that the section authorizes such a rule; but, as I have said, I feel considerable hesitation on the point.

WRIGHT J. I am of the same opinion; and I will only add that, because a sum is to be recovered as a penalty, it does not seem to me to follow that it is to be recovered on information. The word "penalty" is ambiguous, and it is plain that penalties may be recovered not only on information, but also on complaint.

Rule discharged.

Solicitors: *Ince, Colt & Ince, for Rees, Cardiff.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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Feb. 12, 13;
April 22.

GASKELL and Another *v.* GOSLING and Another.

Company—Debentures—Trustees for Debenture-holders—Receiver—Principal and Agent—Liability for Goods ordered by Receiver.

By a deed made between a limited company and the defendants as trustees for debenture-holders, by which the business and property of the company were mortgaged to secure payment of the debentures, it was provided that in certain events the trustees might by writing under their hands appoint a receiver of the mortgaged premises, who should have power to carry on the business, and that any receiver so appointed should be the agent of the company, who alone should be liable for his acts and defaults. The defendants were two of the members of a banking firm, who were the holders of the debentures. They appointed a receiver under the deed, stipulating that all moneys received by him as receiver should on the day of their receipt be paid in to an account to be opened by him with the banking firm, and that cheques drawn by him upon the account should be countersigned by their solicitor. Shortly after the appointment of the receiver an order was made for the compulsory winding up of the company. Subsequently to the winding-up order, the receiver continued to carry on the business, and in the course of so doing ordered goods from the plaintiffs. In an action against the defendants for the price of the goods:—

Held, by Lord Esher M.R. and Lopes L.J., Rigby L.J. dissenting, that the correct inference was that, at any rate after the winding-up order, the defendants were the principals for whom the receiver, as agent, carried on the business, and consequently the action was maintainable against them.

Appeal from the judgment of the Lord Chief Justice at the trial before him without a jury.

The action was brought to recover from the defendants (one of whom however was deceased at the date of the writ) 488*l.* 9*s.* 3*d.*, the balance of the price of goods alleged to have been sold and delivered by the plaintiffs to the defendants between December 5, 1893, and January 31, 1895.

The facts were as follows. The defendants, who were two of the members of the banking firm of Goslings & Sharpe, were the trustees under a deed, dated May 18, 1892, for debenture-holders of a limited company, the name of which was Poole and White, Limited, and which carried on the business of electrical engineers and manufacturers and vendors of electrical

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appliances. The company had executed three trust deeds for securing three series of debentures respectively, the defendants being the trustees for the holders of the second series, the whole of which was held by the firm of Goslings & Sharpe. By the deed of May 18, 1892, which was made between Poole and White, Limited, thereinafter called "the company," of the one part, and the defendants, thereinafter called "the present trustees," of the other part, it was recited that the company had raised the sum of 7000*l.* by the issue of debentures (the first series), and that by a deed dated February 1, 1892, they had conveyed to trustees for the holders of those debentures certain leasehold premises belonging to the company for the residue of the term except the last day thereof, and all the business and undertaking of the company and all other the property, real and personal, both present and future, of the company other than its capital for the time being uncalled, upon certain trusts therein declared for securing payment of the first series of debentures, and that the company had determined to raise a further sum of 3000*l.* by the issue of second mortgage debentures of 1000*l.* each. By clause 1 of the deed it was stated that in it the terms "the debentures" and "the debenture-holders" meant respectively the debentures of the company for the time being outstanding and entitled to the benefit of these presents, and the holders for the time being of the debentures. By clauses 2 and 3 of the deed the company conveyed the same property as was comprised in the deed of February 1, 1892, to the present trustees to hold, subject to that deed, upon the trusts thereinafter declared. By clause 4 it was provided that the premises so conveyed should be held by the trustees upon trust to permit the company to hold and enjoy the same, and to carry on thereon and therewith the business or any of the businesses authorized by the memorandum of association of the company until the security thereby constituted became enforceable as thereinafter provided, and that, until then, the conveyance of the property of the company other than the leasehold premises should operate merely as a floating security, and should not prevent the company in the ordinary course of its business from dealing with the property as it thought fit, but

so nevertheless that the company should not have power to mortgage or charge any of the property conveyed otherwise than subject to the charge thereby created. By clause 5 it was provided that, when the security constituted by the deed became enforceable as thereinafter provided, the trustees should hold the premises conveyed, thereinafter called "the mortgaged premises," upon trust that they might in their discretion, without any further consent on the part of the company, enter into and take possession of the mortgaged premises, and might at the like discretion sell, call in, collect and convert into money the same or any part thereof. By clause 6 it was provided that the security constituted by the deed should become enforceable in each and every of the events following: (1.) if default were made in the payment of some principal moneys secured by the debentures or any of them, or in the payment of some interest on the same, for the period of three weeks after such principal moneys and interest should respectively become payable; (2.) if an order were made, or if an effective resolution of the company were passed for the winding up of the company; (3.) if a distress or execution were levied or enforced upon or against any of the chattels or property of the company; (4.) if the company committed a breach other than as aforesaid of any covenant contained in the deed. By clause 11 it was provided that the trustees should hold the moneys to arise from any sale, calling in, collection, or conversion under the power of conversion upon trust in the first place to pay the costs and expenses incurred in or about the execution of such power, or enforcing of such mortgage, or otherwise in relation to the deed, and to apply the residue of the said moneys first in or towards payment to the holders of the debentures pari passu in proportion to the amounts due to them respectively, and without any preference whatsoever, of all principal and interest remaining unpaid on such debentures, and to pay the surplus (if any) of such moneys to the company or its assigns. By clause 12 provision was made by which the appointment of a receiver by the Court might be procured. This clause, however, was not acted upon. By clause 13 it was provided that, "At any time after the security hereby constituted becomes enforceable, or a petition

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for winding up the company shall have been presented, or a resolution capable of being confirmed as a special resolution to wind up the company shall have been passed, or a notice of a meeting to consider a proposed extraordinary resolution for winding up the company, or judgment shall have been recovered against the company on which execution has not been stayed and remains unpaid or unsatisfied for six days after the date thereof, or the trustees shall certify that in their opinion the security hereby given is endangered, the trustees may, without further notice, by writing under their hands, appoint one or more person or persons receiver or receivers of the mortgaged premises, or any part thereof, and may from time to time remove any such receiver and appoint a new receiver in his place; and any person so appointed shall be the agent of the company, who alone shall be liable for his acts and defaults. The person or persons to be appointed a receiver or receivers may be an officer or officers of the banking firm in which the present trustees are partners; and in that case the trustees may pay such firm the whole or any part of the receiver's commission as income of the said firm, but without such firm incurring any liability for the acts and defaults of any such receiver; and any receiver so appointed may, with the consent of the trustees, to be given either by the instrument appointing him receiver or otherwise, as the trustees shall think fit, exercise all or any of the powers conferred by the Conveyancing and Law of Property Act, 1881, as if he had been appointed receiver by a mortgagee under the power in that behalf conferred by such Act, and without prejudice to such powers, shall also have power to do all or any of the following things: (*a*) take immediate possession of the mortgaged premises or any part thereof; (*b*) carry on any business or businesses of the company, and for that purpose to use in any manner the mortgaged premises, and to make or procure advances, and to secure the same with interest at a rate not exceeding 6 per cent. per annum by mortgage or charge in priority, pari passu with, or subsequent to moneys secured by the debentures or otherwise; (*c*) make and effect all repairs and insurances, and do all other acts which the company might do in the ordinary conduct of its business, as well for the protection

as the improvement of the mortgaged premises; (*d*) employ managers, clerks, workmen, and other persons; (*e*) purchase stock-in-trade; (*f*) let all or any part of the mortgaged premises for such term and at such rent as he may think fit; (*g*) compromise any claim by or against the company; (*h*) pay off any prior incumbrances upon the mortgaged premises, and for that purpose to raise money by sale or mortgage thereof; (*i*) use the name of the company in any proceedings; and (*j*) generally for the purpose of carrying on such business or businesses use and deal with the mortgaged premises as the company might have done before such appointment." The clause then made provision for a commission to be paid to the receiver and other matters, and that "all moneys received by any receiver, after providing for the matters specified in the first three paragraphs of clause 8 of s. 24 of the Conveyancing and Law of Property Act, 1881 (1), including therein all other expenses of the receiver in the exercise of his powers, shall be applied in keeping down the interest on the debentures, and the balance shall be paid to the company unless and until any principal moneys secured by the debentures be overdue, and, if overdue, then to the trustees to be held on the trusts hereby declared of and concerning the moneys to arise from the execution of the power of conversion." Nothing turned upon the existence of the third set of debentures.

On July 22, 1892, by writing under their hands, the defendants certified that in their opinion the security given by the deed was endangered, and, in pursuance of the powers thereby vested in them, appointed W. J. Kelly receiver of all and singular the property and rights thereby mortgaged, and declared that as such receiver he might exercise all and singular the powers conferred by the deed, whether expressly or by implication, upon a receiver or receivers appointed in pursuance of the power aforesaid, subject to the proviso thereinafter contained, that is to say, provided that such receiver should forthwith open an account in

(1) 44 & 45 Vict. c. 41, s. 24, sub-s. 8: "The receiver shall apply all money received by him as follows, namely . . . (ii.) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver."

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his name as receiver at the bank of Messrs. Goslings & Sharpe, and that his receipt or receipts for any moneys to be received by him as such receiver as aforesaid should, in order to discharge the persons paying such money, be countersigned by John Tryon, and that all moneys so received should on the day of their receipt be paid in to the said account, and that the said bank should not honour any cheques drawn upon the said account by him unless the same should be countersigned by the said John Tryon. John Tryon was a member of the firm of solicitors who acted for the defendants as trustees for the debenture-holders, and was a holder of debentures of the third series. Kelly accepted the position of receiver and was let into possession of the mortgaged premises by the company. On July 26 he opened the account with the bank stipulated for by the terms of his appointment, which was headed "Poole and White, Limited. W. J. Kelly, Receiver," and the company's business was thenceforward carried on by him. All moneys received by him from the business were paid in to the above-mentioned account. The account was from time to time charged by the banking firm with interest on the second set of debentures, the sums so charged amounting altogether to 484*l.* 19*s.* There was evidence in the correspondence put in that this was done by the authority of the receiver. On September 1, 1892, a petition for the compulsory winding-up of the company was presented, and on September 14, 1892, a compulsory winding-up order was made taking effect from the presentation of the petition. Notwithstanding the winding-up order, Kelly continued to carry on the business until the beginning of 1895, when the trustees for the holders of the first series of debentures enforced their security and took possession of the mortgaged premises. The liquidator of the company never interfered in the carrying on of the business. In the course of so carrying on the business between December 5, 1893, and January 31, 1895, Kelly gave orders for the goods supplied by the plaintiffs in respect of which the action was brought, signed "Poole and White, Limited. W. J. Kelly, Receiver." Payments were from time to time made to the plaintiffs on account of the goods so supplied by them out of the moneys in the bank

to the credit of the receivership account. It appeared that advances had been made by the banking firm to the receivership account, but apparently they were always made against specific bills or other securities. The proviso in Kelly's appointment with regard to the countersigning of cheques drawn upon the account by Mr. Tryon was insisted upon up to September, 1893; but after that month this limitation upon the power of the receiver to draw cheques upon the account was not enforced. The Lord Chief Justice held that the true inference from the above-mentioned facts was that the defendants were the principals of Kelly in respect of the business carried on by him after the winding-up order, and that the orders for the goods supplied by the plaintiffs were given by their authority. He therefore gave judgment for the plaintiffs for the amount claimed.

Jelf, Q.C., and *W. F. Hamilton*, for the defendants. The defendants were not the principals of Kelly. They never did any act holding him out as their agent to the plaintiffs, who had no knowledge of their existence when the goods were supplied. The question therefore is simply whether the defendants, as between themselves and Kelly, must be taken to have authorized him to pledge their credit. There is no evidence that they did so. This question depends mainly on the terms of the deed of May 18, 1892. By the terms of that deed the trustees had no power themselves to carry on the business of the company. They could only sell, call in, and convert the property mortgaged in case the security became enforceable. By the terms of clause 13 they were made under certain circumstances the agents of the company to appoint a receiver and manager of the business, who was to be the agent of the company. They were not to be responsible for his acts or defaults. This is analogous to the ordinary power given to a mortgagee by a mortgage deed to appoint a receiver who is to be the agent of the mortgagor, in the case of which it is clear that the mortgagee incurs no liability by appointing a receiver. The defendants plainly never intended to do anything but appoint a receiver under this clause. At the time when Kelly was appointed the security had not become enforceable, for the

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giving of a certificate by the trustees that the security is endangered is not one of the events upon which it became enforceable. Therefore the trustees themselves could not then take possession of the mortgaged property. The fact that the trustees made the appointment of the receiver under the power subject to certain restrictions did not make him their agent. The imposition of such restrictions does not prevent the appointment from being in pursuance of the power. Having power to appoint, they may make the appointment subject to limitations. They no doubt had power to appoint and remove the receiver, but they had no power to superintend his actions in the sense of giving him orders as to how he was to carry on the business. It is clear that by the terms of the appointment and prior to the winding-up order he was not the agent of the trustees, and they did nothing afterwards to alter his position and to constitute him their agent. No hardship is entailed on the plaintiffs. It is submitted that, if not liable for the price of the goods, Kelly would be liable personally in damages to the same amount on an implied warranty that he had a principal whom he had authority to bind, on the principle laid down in *Kelner* v. *Baxter*. (1) From the manner in which the order was signed the plaintiffs had notice that he was acting as a receiver, and therefore ought to have concluded either that he was a receiver appointed by the Court, in which case they would have to look to him personally for the price of the goods (*Burt, Boulton & Hayward* v. *Bull* (2)), or that he was appointed under the terms of some instrument, in which case it was for them to ascertain those terms. The defendants never went into possession themselves as mortgagees. Appointing a receiver to take possession under clause 13 of the deed is clearly not equivalent to taking possession themselves.

[They also cited *Owen & Co.* v. *Cronk*. (3)]

H. Reed, Q.C., and *Hansell*, for the plaintiffs. The question is whether upon the particular facts of this case the defendants were in truth the principals of Kelly. The case of *Owen & Co.* v. *Cronk* (3) shews that a receiver may in such a case become

(1) L. R. 2 C. P. 174. (2) [1895] 1 Q. B. 276.
(3) [1895] 1 Q. B. 265.

the agent of the trustees for debenture-holders. The defendants appointed Kelly and could revoke his appointment. The account opened with the bank was not treated as a receiver's account, but really as the account of the defendants themselves. The receiver could not draw upon it without the countersignature of the solicitor for the defendants, i.e., in substance without their consent. The restrictions imposed upon Kelly are consistent only with the view that he was carrying on the business as the agent or servant of the defendants. If he were appointed receiver and manager under the deed, they could not prevent him from drawing on his account without their consent. The effect of the restrictions upon him was that practically he could only carry on the business subject to their orders. The banking firm, for which they were trustees and of which they were members, advanced money to him for the purposes of the business. They debited the account from time to time with interest on the debentures which belonged to the firm as it fell due. As bankers they paid the interest due to them as debenture-holders, thereby taking the profits of the business carried on.

Clause 13 of the deed of May 18, 1892, is divisible into two parts. The words with regard to the receiver being the agent of the company only apply to his dealings with the property of the company as receiver, and are intended to protect the trustees from being liable to the company or others in respect of those dealings. They do not apply to the power of carrying on business and other powers which as manager he is authorized to exercise with the consent of the trustees. In exercising those he is the agent of the trustees.

These goods were ordered after the order for the winding up of the company. Whatever may have been the case before, it is contended that, after that order, it is impossible that Kelly should be considered as the agent of the company, for it then ceased to exist as a going concern. It could no longer carry on business, and only existed for the purposes of the winding-up. The price of the goods could not be proved for in the liquidation. It is submitted that, after the winding-up order, the business was in point of fact carried on as the business of the defendants.

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It was clearly not carried on as the company's business, for they could no longer carry on business, and Kelly was and acted as a mere agent. The facts amply justify the conclusion of the Lord Chief Justice that the defendants were in truth the principals of Kelly. If the contention for the defendants is correct, nobody contracted with the plaintiffs or is liable for payment of the price of the goods.

Hamilton, in reply.

Cur. adv. vult.

April 22. LORD ESHER M.R. This is an action brought by the plaintiffs for the price of goods alleged to have been supplied by them to the defendants. The goods were ordered by one Kelly. The Lord Chief Justice has found that he was the defendants' agent for the purpose of giving the order for the goods. He ordered the goods as receiver in the name of a company, and therefore cannot be made liable personally, and he did not in terms profess to be acting for the defendants. Therefore the question is whether they were in truth his undisclosed principals. In order to determine his position as regards the defendants, it is necessary to consider the terms of the contract made by the deed of May 18, 1892, between the defendants as trustees for the second debenture-holders and the company, under which he is alleged by the defendants to have been appointed. By that contract the trustees had in certain events power to appoint a receiver, and it is alleged that, as by the terms of the contract a receiver so appointed was to be the agent of the company, who were to be responsible for his acts, the trustees, although they were the persons who did in fact appoint him, could not be liable for goods ordered by him. It seems to me that the law which has been laid down with regard to such a receiver is somewhat anomalous; but the Lord Chief Justice did not gainsay that law. Neither do I. I will assume that, on the true construction of this contract, the trustees, under certain circumstances and when certain conditions arose, were entitled to appoint a "receiver," by which is meant, I think, a receiver in the well known sense of that term, with the ordinary rights and liabilities incident to the position of a re-

ceiver in that sense; and that, if they did appoint such a receiver under such conditions, by the terms of the contract entered into by the company he would not be the agent of the trustees, nor would they be responsible for his acts, but he would be the agent of the company, who would be responsible for his acts, although they could give him no orders, and although he would be acting, in one sense, no doubt, in their interest, but to a much greater extent in the interest of the debenture-holders whom the trustees represented; so that outside persons such as tradesmen, from whom goods might be ordered by him for the purposes of the business, could not look for payment to those who really appointed him. That, however, is such an anomalous position, in my opinion, that I think that those who affect to appoint a receiver under such a contract as this must take great care that they appoint him as a receiver in the ordinary sense of the term as contemplated by the contract; for, if they do not so appoint him, but appoint him in such a way that he is their mere servant or agent, then I think they cannot vouch the law that has been laid down with regard to a receiver properly so called. As I have said, I do not gainsay that law; but the question appears to me to arise whether, under the circumstances which existed in the present case, the defendants did appoint Kelly as such a receiver, or appointed him as agent for themselves as trustees for the debenture-holders. They did not appoint him with the freedom or subject to the conditions ordinarily incident to the position of a receiver; but they reserved to themselves a control over him with regard to every step which he might take. It was stipulated by the terms of his appointment that, if he received any money in the course of carrying on the business, he was to pay it into the bank in which they were partners, to an account upon which he could not draw without the counter-signature of their solicitor. Therefore, if he ordered goods for the purposes of the business, he could not pay for them without their agent's consent. That being so, I do not think that he was appointed as a receiver within the meaning of the contract. I should say that a receiver in that sense would have power to carry on the business and to pay out of its proceeds for the goods ordered in the course

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of it, and that he ought not to be put in the position of ordering such goods and then having to say to the tradesmen supplying them that he could not pay for them because those who appointed him had reserved control over all such payments themselves. The Lord Chief Justice seems to me to have thought that Kelly was not appointed as a receiver within the meaning of the contract; but he considered that it was not necessary to decide that point. I agree with him that it is not necessary to do so; but I think it my duty not to flinch from expressing my opinion that he was not appointed as such a receiver as was contemplated by the contract, but as agent for the trustees.

I will, however, assume that Kelly was originally appointed a receiver in the ordinary sense, and that therefore he was for a time in the position of being able to order goods so as not to make himself or the trustees liable, but only the company, who for that purpose were to be considered his principals. But, assuming that to be so, the question arises whether that state of things is to be considered as continuing whatever might happen to the company, or whether it is not a necessary implication that it is only to continue while the company continues to exist as a going concern, and not after it has ceased to do so. After a time, proceedings having been taken for winding up this company, it went into liquidation, and thereupon it ceased to be a going concern, and only existed for the purpose of being wound up. Under those circumstances, how can Kelly be considered as continuing to occupy the position of a receiver appointed by the consent of the company under the agreement to act as the agent of the company? The company having really ceased to exist, it seems to me impossible any longer to look upon him as being appointed to act as their agent. When the company went into liquidation, or, at any rate, as soon as the liquidation was known to the trustees, they should have withdrawn Kelly's appointment. The Lord Chief Justice has found as a matter of fact that the liquidation was known to the trustees, and it cannot be doubted that that inference was correct. They nevertheless allowed Kelly to carry on the business. His account with the bank remained open, and their

solicitor continued to countersign the cheques drawn by him. They called him receiver; but they could not suppose that he was carrying on the business as the agent of the company, for the company had for the purposes of business ceased to exist. It seems to me, therefore, without gainsaying any of the law as to a receiver appointed under such a contract as that between the trustees and the company, that when the liquidation became known to the trustees they should have withdrawn the receiver. They did not do so, but allowed him to continue carrying on the business. The inference is, I think, that they elected themselves to carry on the business. It is not necessary to determine what the position might be as between them and the company in liquidation. So far as outsiders were concerned, I think that, the defendants having allowed Kelly to continue to carry on the business, and their solicitor having continued to countersign the cheques, with regard to goods subsequently ordered by Kelly they could not say that he was not acting as their agent. Upon the facts of the case it appears to me that they were in truth his undisclosed principals. I come with the less hesitation to this conclusion because it appears to me that, if the argument for the defendants is correct, the trustees, as representing the debenture-holders, would be reaping the profits of the plaintiffs' goods, leaving the plaintiffs without any one whom they could make liable for the price of them. The liquidator had nothing to do with ordering these goods, and the price of them could not be proved for in the liquidation. Kelly did not, I think, give the order for these goods so as to make himself personally liable. Therefore, if the defendants' argument is correct, the business might be carried on with their knowledge to any extent, and goods might be received and used for the purposes of that business for their benefit, without any liability either on their part or that of any one else to pay for them. For the reasons which I have given I agree with the judgment of the Lord Chief Justice, and think that the appeal should be dismissed.

The following judgment was read by

LOPES L.J. I cannot help thinking that this case depends on the determination of a question of fact, that question of

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fact being whether the present defendants were in the circumstances of this case, as from December 5, 1893, to January 31, 1895, in fact undisclosed principals. This is the view adopted by the Lord Chief Justice, and, in my judgment, it is right. The action is brought to recover 488*l.* 9*s.* 3*d.*, the balance of the price of goods sold and delivered by the plaintiffs to the defendants between December 5, 1893, and January 31, 1895. It is necessary to mention some of the facts of the case. The firm of Poole and White, Limited, carried on in London the business of electrical engineers, and executed three trust deeds for securing certain debentures. The first deed was dated February 1, 1892, and by that deed all the property of the company, except certain leaseholds and uncalled capital of the company, was assigned to trustees for the benefit of debenture-holders to the extent of 7000*l.* On May 18, 1892, a further deed was executed by Poole and White, Limited, in favour of Francis Gosling and William Cunliffe Gosling, as trustees for debenture-holders to the extent of 3000*l.* This is the deed with which this case is concerned. These last-mentioned gentlemen were members, but not the sole members, of the firm of Goslings & Sharpe, bankers, who were the holders of the whole issue of the 3000*l.* debentures. There was a third issue of debentures, but that issue does not affect this case. The deed of May 18, 1892, contained a power for the trustees to appoint a receiver, and the trustees exercised that power by appointing W. J. Kelly receiver. The appointment was the act of the trustees, the mortgagees, but the appointee was, no doubt, the agent of the mortgagors. The words of the clause with regard to the appointment of a receiver are not immaterial. They are: "We, the trustees, in pursuance of the power in that behalf vested in us, appoint W. J. Kelly receiver of the property and rights hereby mortgaged, and declare that as such receiver he may exercise all and singular the powers conferred by the indenture whether expressly or by implication, provided that such receiver shall forthwith open an account in his name as receiver at the bank of Messrs. Goslings & Sharpe, and that his receipt or receipts for any moneys to be received by him as such receiver as aforesaid shall, in order to discharge the persons paying such money, be countersigned by John Tryon,

and that all moneys so received shall on the day of their receipt be paid into the said account, and that the said bank shall not honour any cheques drawn upon the said account by him unless the same shall be countersigned by the said John Tryon." Tryon had been, or was, the chairman of the company, and afterwards became, and then was, a holder of debentures of the third series. But it would appear from an answer to interrogatories which was put in at the trial that John Tryon was solicitor of the trustees, Francis Gosling and William Cunliffe Gosling, and I infer that it was in that capacity he countersigned the cheques. I must refer to some of the provisions of the deed. It recites that the company desired to raise a further sum of 3000*l.*, that being the second set of debentures. It provides that the deed is for the benefit of the second set of debenture-holders. Clause 3 provides for the conveyance of all the company's property to the trustees upon the trusts declared. Clause 4 provides that all the property and effects shall be held by the trustees upon trust that they shall permit the company to hold and enjoy the same and carry on thereon and therewith the business or any of the businesses authorized by the memorandum of association of the company until the security constituted by the deed becomes enforceable. Clause 5 provides that when the security becomes enforceable the trustees shall hold the premises upon trust that the trustees may in their discretion, without any further consent on the part of the company, enter into and upon and take possession of the mortgaged premises, and may at the like discretion sell, call in, collect, and convert into money the same or any part thereof. Clause 6 provides that the security is to become enforceable if default is made in payment of interest on the debentures for a period of three weeks. Clause 11 provides that the trustees are to hold the moneys arising from any sale upon the trusts therein declared. Clause 13, which is the most important in this case, provides that "at any time after the security hereby constituted becomes enforceable or a petition for winding up the company shall have been presented or" (this was the case which occurred) "the trustees shall certify that in their opinion the security hereby given is endangered,

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the trustees may, without further notice, by writing under their hands, appoint one or more person or persons receiver or receivers of the mortgaged premises or any part thereof, and may from time to time remove any such receiver and appoint a new receiver in his place, and any person so appointed shall be the agent of the company who alone shall be liable for his acts and defaults." Then are enumerated the powers of the receiver. He may take immediate possession; he may carry on any business, and for that purpose use in any manner the mortgaged premises; he may make or procure advances and secure the same with interest at a rate not exceeding 6 per cent. per annum; he may compromise claims; he may pay off incumbrances; he may use the name of the company in any proceedings. All this contemplates the company being a going concern, with power to carry on its business by an agent. I do not think it necessary to notice any other clauses of the deed.

The deed being executed in May, 1892, in the following July Mr. Kelly as receiver takes possession of the business, and thereafter carries on the business down to January, 1895. The claim in the present case is in respect of goods delivered by the plaintiffs during a period beginning from December, 1893, to January 31, 1895. In my judgment, it is only necessary to consider the position of things as they existed in December, 1893. On September 1, 1892, a petition for winding up the company was presented, upon which an order was made by the Court. Mr. Wildy was appointed the liquidator of the company. From that date the company ceased to exist as a company and ceased to exist as a going concern. It was a company only in name. Neither the official liquidator nor the creditors' liquidator took any part, direct or indirect, in the carrying on of the business, which continued to be carried on in the name of "Poole and White, Limited. Kelly, Receiver." After the winding-up, in my judgment, the company could confer no power on the trustees nor on Kelly to carry on the business. Neither the trustees nor the agent of the company could any longer pledge the credit of the company. The power of dismissing Kelly was alone vested in the trustees. They

alone could determine his appointment. They do not do so. They permit him to continue to carry on the business as before, with cheques countersigned by their solicitor, and remunerate him for so doing, and, I cannot for a moment doubt, with full knowledge of the position of the company. It is in these circumstances that the goods in question were ordered by Kelly. The company certainly were not his principals. Kelly cannot be said to contract as principal, because in express terms he orders the goods as an agent for others. Either Kelly is liable personally, having no principal, on the authority of *Collen* v. *Wright* (1), or the trustees as his principals are liable. Assuming, for the purposes of this case, but without deciding the point, that up to the date of the presentation of the petition Kelly was the agent of the company, and that the company were liable as his principals, I come to the conclusion that, after the winding up and at the time of the supply of the goods in question, there was ample evidence to justify the Lord Chief Justice in finding that the trustees, the defendants, were the undisclosed principals of Kelly. It is to be observed that no person dealing with the company after the date of the presentation of the petition for winding-up could have any claim against the company, because the only debts provable in the winding-up are debts due and payable at the commencement of the winding-up. The appeal must be dismissed with costs.

The following judgment was read by

RIGBY L.J. As I have the misfortune in this case to differ, not only from the Lord Chief Justice, but also from the other members of this Court, I think it well that I should set out my reasons for so doing at greater length than I should in other circumstances have thought necessary.

The plaintiffs in this action sued the defendant Francis Gosling for 488*l.* 9*s.* 3*d.*, the balance of the price of goods alleged to have been sold and delivered between December 5, 1893, and January 31, 1895, to him and William Cunliffe Gosling, named as a defendant in the writ, but dead at the date of the writ.

(1) 8 E. & B. 647.

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It was not disputed that the goods were sold and delivered, and that the amount claimed remained due to the plaintiffs. The defendant Francis Gosling, however, denied that the goods were bought by him and the deceased William Cunliffe Gosling, or either of them; and the only issue in the action came to be whether he and the deceased, whose names had not appeared in the transactions and who were not alleged to have held themselves out as principals, or even to have been heard of by the plaintiffs, were nevertheless liable as undisclosed principals. The question whether they were principals or not was of course one of fact, but only in the sense that their liability or non-liability had to be ascertained by a consideration of the effect of documents and of admitted facts. The case was tried by the Lord Chief Justice without a jury; but, if there had been a jury, there would have been nothing to leave to them, as there were no facts in dispute.

The two Goslings were trustees of a deed of May 18, 1892, made between Poole and White, Limited, a company carrying on business as manufacturers and vendors of electrical appliances, of the one part, and the trustees of the other part. The effect in detail of this deed is dealt with hereafter; but it was a mortgage deed for securing the payment of a second series of debentures of the company, amounting altogether to 3000*l*. It was made subject to a similar mortgage trust deed for securing a first series of debentures, amounting to 7000*l*., taking priority over the second series. That deed was dated February 1, 1892. There were third debentures, amounting to 1000*l*., secured by a deed later in date than that securing the second series of debentures. The two Goslings were members with other partners of the banking firm of Goslings & Sharpe of Fleet Street, and the firm held all the second series of debentures as partnership property. Under a power in the trust deed of May 18, 1892, the trustees by writing dated July 22, 1892, appointed William John Kelly, the secretary of the company, receiver with very wide powers, and subject to a proviso, the effect of which will have to be considered later on, whereby it was made a term of the appointment that the receiver should forthwith open an account in his name as receiver at the bank

of Messrs. Goslings & Sharpe, that his receipts for moneys received by him as receiver should be countersigned by John Tryon, that all moneys so received should on the day of receipt be paid to the said account, and that the bank should not honour any cheques drawn upon the account unless countersigned by the said John Tryon. John Tryon was a member of the firm of solicitors who acted for the trustees in the transaction of the debentures. He was also a man of some experience in the business of the company, being or having been its chairman, and he was interested at any rate as the holder of debentures of the third series in its commercial fortunes. William John Kelly accepted the appointment of receiver under the writing of July 22, 1892, was let into possession by the company, and on the 26th of the same month opened the account stipulated for with Messrs. Goslings & Sharpe, which was headed "Poole and White, Limited. W. J. Kelly, Receiver." The proviso with reference to the countersigning of cheques by Mr. Tryon was insisted upon up to September, 1893, after which time this limitation on the drawing power of the receiver was no longer enforced. The company's business was carried on by the receiver, and the banking account was continued, from July 26, 1892, down to September, 1892. On the 1st of that month a petition for the compulsory winding-up of the company was presented, and a compulsory winding-up order was made on the 14th, the winding-up dating from the presentation of the petition. Notwithstanding the winding-up, the receiver assumed to continue the business as receiver until January or February, 1895, when the first debenture-holders or their trustees interfered, as they might have done at any time previously, and put an end to the carrying on of the business. The liquidator of the company never interfered at all. During the whole time the business was carried on as if for Poole and White, Limited, and all orders for goods, or at any rate all orders to the plaintiffs, were signed "Poole and White, Limited. W. J. Kelly, Receiver." From time to time the receiver's account was charged by the banking firm with interest on the second debentures, the sums so charged amounting altogether to 484*l.* 19*s.* The defendants' counsel

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gave evidence by correspondence that these charges were made by the authority of the receiver. The above statement contains all the facts, as distinguished from conclusions of law, on which the Lord Chief Justice relied in support of his decision that the trustees of the deed of May 18, 1892, were the undisclosed principals actually carrying on the business during the period in which the plaintiffs' goods were supplied. Certain other facts were relied upon by the plaintiffs' counsel on the appeal, and it is necessary in order to make this statement complete to refer to them. They were as follows: (*a*) That the banking firm made advances to the receiver's account. The defendants' counsel offered to prove that all these advances were made against specific bills or other securities; and thereupon the Lord Chief Justice intimated that he should not rely upon these advances. (*b*) That the plaintiffs were paid sums on account of the price of the goods out of the receivership account. This the Lord Chief Justice did not refer to in his judgment. The facts (*a*) and (*b*) would be material, as also would the charge of interest in favour of second debenture-holders, only as shewing, if they did tend to shew, that the receiver's account was in truth the account of the second debenture-holders or their trustees, and that they by cashing cheques in favour of the plaintiffs admitted liability to them. This point will be dealt with below.

It seems to me that the only way in which the responsibility of the trustees as undisclosed principals could as matter of law be made out would be either (1.) on considerations arising from partnership law; or (2.) on considerations arising from the law between mortgagor or mortgagee, and particularly from the law as to receivers and mortgagees in possession; or (3.) on some ground arising upon the winding up of the company.

For the sake of clearness it will be desirable to deal with (1.) and (2.) separately from (3.), thus treating the carrying on of the business down to the time of the winding-up apart from the carrying of it on during the winding-up; and it will be convenient to refer to certain settled principles which may throw light upon the present case.

Before the decision in *Cox* v. *Hickman* (1) it might well have been thought that the trustees were partners in the business. But this conclusion appears to me not now to be consistent with the case of *Cox* v. *Hickman*. (1) In that case creditors of a firm were sought to be made liable as partners—that is, as principals—for debts incurred by their trustees in carrying on a business for the purpose of paying off their debts. Since that decision it has been clear law that creditors having security for their debts upon a business carried on for (among other purposes it may be) the payment of those debts are not liable as principals by reason of their profiting by the carrying on of the business, even though they may have considerable power of control over the business. How great the control was in the case of *Cox* v. *Hickman* (1) is shewn conveniently by the following passage in the opinion of Williams J. (2): "It appears to me that the true construction of the deed is that the creditors in effect buy the goodwill of the business, and the means for carrying it on for their own benefit until enough shall have been earned to pay their debts in full, at the price of consenting to accept the provisions of the deed in full satisfaction of their claims against the Smiths, and of entering into the covenant not to sue them in respect thereof. The business is then to be carried on, not under the old firm of Benjamin Smith & Son, but under the new firm of the Stanton Iron Company. The profits are to be appropriated exclusively to the payment of the debts of the creditors until they are paid off; and the trustees are placed under the control of the general body of creditors, who may at their pleasure alter, add to, or diminish the powers, trusts, and provisions of the deed, and may (in effect) appoint new trustees, and may direct that the works shall be discontinued; and in such case the trustees are to wind up the business, and, after paying all the expenses and liabilities, divide the clear residue among the creditors rateably in proportion to their respective debts." The above passage seems to me to contain a fair summary of the deed in *Cox* v. *Hickman* (1), which would be made a complete one by the additional statement that, when all the debts had been paid,

(1) 8 H. L. C. 268. (2) 8 H. L. C. 268, at p. 293.

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the trustees were to hold the trust estates in trust for the Smiths. Nevertheless, the important interest taken by the creditors under the deed and the extensive powers of control given to them did not, according to the decision of the House of Lords, justify the conclusion that the creditors were principals. On the question of the extent of control over a business which is compatible with the true relation being one of creditor and debtor only, in a case where the contract, though it gives a large interest in the profits of the business by way of commission, and makes the whole of the profits available for the payment of past and future advances, is yet in substance one of loan and security between debtors and their creditor founded on the assumption, not of community of interest, but of opposition of interest, the case of *Mollwo, March & Co.* v. *Court of Wards* (1) is perhaps even more instructive than that of *Cox* v. *Hickman*. (2) The amount of control stipulated for in that case is thus summarized in the judgment of the Judicial Committee delivered by Sir Montague Smith (3): "The contract undoubtedly confers on the Rajah" (who was the person sought to be made liable as a partner) "large powers of control. Whilst his advances remained unpaid, the Watsons bound themselves not to make shipments, or order consignments, or sell goods without his consent. No money was to be drawn from the firm without his sanction, and he was to be consulted with regard to the office business of the firm, and he might direct a reduction or enlargement of the establishment. It was also agreed that the shipping documents should be at his disposal, and should not be sold or hypothecated, or the proceeds applied without his consent, and that all the proceeds of the business should be handed to him for the purpose of extinguishing his debt." It will hereafter be seen that there is good ground for holding that in law no control was in the present case stipulated for or exercised by the trustees who are sought to be made liable as principals; but in any conceivable view of the facts the control (if any) which they exercised was altogether insignificant when compared with that which the

(1) L. R. 4 P. C. 419. (2) 8 H. L. C. 268.
(3) L. R. 4 P. C. 419, at p. 436.

Rajah in the Privy Council case referred to, or the creditors in *Cox* v. *Hickman* (1), bargained for.

(2.) The trustees were mortgagees of the company, and it will be well to be consider some points on the law of mortgagor and mortgagee, having regard particularly to receivers and the position of a mortgagee in possession.

A mortgagor left in possession of the mortgaged property, whether real or personal, had a right to receive the income and apply it to his own use, without becoming liable to account to the mortgagee. If there was no receiver, the mortgagee could only make the income available for keeping down the interest on his security by entering into possession. This entry into possession by a mortgagee was always considered a strong assertion of his legal rights, since he did not come under any obligation to account to the mortgagor except in a suit for redemption. He was accordingly treated with exceptional severity in a suit for redemption and made to account, not only for what he actually received, but for what he might without wilful default have received. This was bad enough when there was only one mortgage; but the position became much worse when the mortgage was a second mortgage, since the second mortgagee could at any moment be turned out by the first, and for the sake of such a precarious possession it could seldom be worth while for a second mortgagee to incur the liabilities of a mortgagee in possession. Still greater were the risks and less desirable the possession when the mortgaged property consisted of or included, as it might do, property embarked in trade and subject to the vicissitudes of commercial business. It follows of course from the almost penal liabilities imposed upon a mortgagee in possession that Courts of Equity were very slow to decide that possession had been taken, and would not do so unless satisfied that the mortgagee in possession took the possession in his capacity of mortgagee without any reasonable ground for believing himself to hold in any other capacity: *Parkinson* v. *Hanbury*. (2) The Courts also favoured any means which would enable the mortgagee to obtain the advantages of possession without its drawbacks. Mortgagees began

(1) 8 H. L. C. 268. (2) L. R. 2 H. L. 1.

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to insist upon the appointment by the mortgagor of a receiver to receive the income, keep down the interest on incumbrances, and hold the surplus, if any, for the mortgagor, and to stipulate often that the receiver should have extensive powers of management. Presently mortgagees stipulated that they themselves should in place of the mortgagor appoint the receiver to act as the mortgagor's agent. This made no difference in the receiver's position, and imposed no liability on the mortgagee appointing. Though it was the mortgagee who in fact appointed the receiver, yet in making the appointment the mortgagee acted, and it was the object of the parties that he should act, as agent for the mortgagor. Lord Cranworth, in *Jefferys* v. *Dickson* (1), stated the doctrine of Courts of Equity on the subject to the effect following. The mortgagee, as agent of the mortgagor, appointed a person to receive the income, with directions to keep down the interest of the mortgage, and to account for the surplus to the mortgagor as his principal. These directions were supposed to emanate, not from the mortgagee, but from the mortgagor; and the receiver therefore, in the relation between himself and the mortgagor, stood in the position of a person appointed by an instrument to which the mortgagee was no party. Lord Cranworth, in the case referred to, was speaking of a mortgage of lands; but the same doctrine applies to all kinds of property, being founded, as it is, not upon any considerations peculiar to the law of real property, but upon the contract between the debtor who gives and the creditor who takes the security. Of course the mortgagor cannot of his own will revoke the appointment of a receiver, or that appointment would be useless. For valuable consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with. The appointment so made will stand good against himself and all persons claiming through him, except incumbrancers having priority to the mortgagee who appoints the receiver. By degrees the forms of appointment of receivers became more complicated, and their powers of management more extensive; but the doctrine explained by Lord Cranworth in the case cited was

(1) L. R. 1 Ch. 183, at p. 190.

consistently adhered to, and it remained true throughout that the receiver's appointment, and all directions and powers given and conferred upon him, were supposed to emanate from the mortgagor, and the mortgagee, though he might be the actual appointor, and might have stipulated for all the powers conferred upon the receiver, was in no other position, so far as responsibility was concerned, than if he had been altogether a stranger to the appointment. So common did this practice of appointing receivers by agreement between the parties become that, first by Lord Cranworth's Act (23 & 24 Vict. c. 145) to a limited extent, and afterwards by the Conveyancing and Law of Property Act, 1881, in a more general manner, a power to the mortgagee to appoint a receiver, who was to be agent of the mortgagor, was made a usual incident of mortgages, when not excluded by agreement between the parties. The last-mentioned Act extended the power to property of every description, placed the power to revoke as well as to make the appointment in the hands of the mortgagee, gave the receiver considerable powers of management, and yet made the mortgagor solely liable for all his acts and defaults. This Act, however, only applies in default of agreement between the parties. In itself it is useful only as a statutory recognition and approval of the practice of making the mortgagee's appointee the agent of the mortgagor only; but of course any of its provisions may be embodied in, as they may be excluded from, any particular mortgage security by express agreement between the parties.

It is essential now to arrive at a clear conclusion as to the position of the trustees under the deed of May 18, 1892. Their responsibilities (if any) arising from their appointment of a receiver can then be disposed of. At the date of the deed of May 18, 1892, the company were entitled to leasehold property in the King's Road, Camden Town, used for the purposes of their business, and to other personal property, but, as appears from the recitals to the deed, the leasehold property except the last day of the term, and all the business and undertaking of the company, and all other the property, real and personal, both present and future, of the company other than its capital

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for the time being uncalled, had been conveyed to trustees for the purpose of securing payment of the moneys secured by the first series of debentures for 7000*l*. By clauses 2 and 3 of the deed of May, 1892, the company convey the identical property already conveyed to the trustees for securing the first series of debentures (subject of course to the earlier deed) to the trustees of the deed of May, 1892. The security created was, therefore, during the existence of the earlier deed, that is to say, during the whole period covered by the transactions in the present action, a merely equitable security, no legal property whatsoever being vested in the trustees. By clause 4 the trustees were to hold the premises granted upon trust that they should permit the company to hold and enjoy the same, and to carry on thereon and therewith any business of the company until the security thereby constituted became enforceable as thereinafter provided, until which time the conveyance, except as to the leasehold property, was to be a floating security only. Clause 5 provided that, when the security became enforceable, the trustees were to hold the mortgaged premises upon trust that they might in their discretion enter into and take possession of the mortgaged premises, and at the like discretion sell, call in, and convert into money the same or any part thereof. Clause 6 specified the events on which the security was to become enforceable, with reference to which it is only necessary to observe that the event, and the only event, upon the happening of which the security became in fact enforceable was the making of the order for the winding up of the company on September 14, 1892. Apart from the power to appoint a receiver afterwards referred to these powers of clause 5 are the only material powers given to the trustees, though there are numerous subsidiary clauses for giving effect to those above mentioned. It is plain, therefore, that until September 14, 1892, the trustees could not enter into possession, and of course could not carry on the business, nor could they prevent the company from carrying it on. When that day arrived they could at their discretion enter into possession and sell and convert, but were under no obligation to do so, and even then nothing is said about their carrying on the business—an event which was never

for one moment contemplated. It may be observed in passing that to the full extent that the company was disabled by the winding-up order from authorizing the continuance of the business by the receiver, it was also disabled from authorizing the trustees to undertake the carrying on. Indeed, after the winding-up it was unable to confer any power whatever. The extent of the trustees' powers is therefore measured by clause 5. Although by clause 5 power is given, so far as the company is concerned, to take possession, and sell and convert, those powers could only be exercised with the consent, express or tacit, of the first debenture-holders' trustees, and any sale or conversion under clause 5 must be made subject to their prior legal interest. This would during the continuance of their interest be, if not practically an impossible, at least a very imperfect and doubtful, remedy for the holders of the second series of debentures. Clause 11 correctly declares the trusts on which, if the trustees took possession, they would hold any proceeds of the mortgaged premises which it would be in their power to receive. These trusts exclude the first debenture-holders, and this exclusion would be no interference with their legal rights, for their own interest could not be affected by the sale or conversion, and until they chose to take possession they would have no right to an account against the second mortgagees for back income. Their exclusion, however, puts in a plain light the practical difficulty under which the trustees for the second series of debenture-holders would be placed, if they were willing to accept the responsibility of mortgagees in possession. Clause 12, giving a right to a receiver to be appointed by the Court, was not acted upon, and can throw no light on the construction of the rest of the deed. Clause 13 is a clause of great importance. It enables the trustees on the security becoming enforceable (an event which had not arisen when the actual appointment of a receiver was made), or, among other events, on the trustees certifying that in their opinion the security given by the deed was endangered (a condition fulfilled on the appointment), by writing under their hands to appoint one or more person or persons receiver or receivers of the mortgaged premises, or any part thereof,

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and from time to time to remove any such receiver and appoint another in his place. Then follow the important, but common forms, words—"and any person so appointed shall be the agent of the company, who alone shall be liable for his acts and defaults." These words, unless their effect is in some way controlled, are decisive of the question whether by the appointment the trustees became principals of the receiver. They are inserted for the very purpose of preventing such a result. As appears from the statement hereinbefore contained, they express the usual intention in cases where a receiver is appointed by a mortgagee. It was argued that clause 13 should be treated as consisting of two parts, the first ending with the words last quoted and applicable to the acts and defaults of a receiver properly so called, and the second dealing with a right to confer additional powers upon a receiver, so as to make him manager, in respect of the exercise of which additional powers the trustees were to be responsible; but that is not the true construction of the clause. The words "with the consent of the trustees to be given either by the instrument appointing him receiver, or otherwise as the trustees shall think fit," are confined by the grammatical structure of the sentence in which they occur, coming as they do as a parenthesis between the words "may" and "exercise," to the subject governed by the compound verb "may exercise," that is to say, to the powers conferred by the Conveyancing Act, 1881. The words "and without prejudice to such powers shall also have power to do all or any of the following things" come in as an independent branch of the sentence, and are not governed or qualified by the reference to the consent of the trustees. By the mere fact of his appointment the receiver gets all the powers, (*a*) to (*j*) inclusive, set forth in clause 13, and they do not require to be specifically referred to in the appointment. If it were possible to use the words "with the consent of the trustees &c.," as involving an argument in favour of the trustees being principals to the receiver, the argument would not apply in the present case, where no consent to the exercise of the powers conferred by the Conveyancing Act, 1881, was given or required. The parts of clause 13 which provide that the person or persons to

be appointed a receiver or receivers may be an officer or officers of the banking firm in which the trustees are partners, and for payment in that case of the whole or part of the receiver's commission as income of the said firm without such firm incurring any liability for the acts and defaults of any such receiver, shew how consistently the principle of making the receiver agent of the company only is adhered to throughout. Again, the distinction between the cases of entry into possession (1.) by the trustees and (2.) by the receiver is clearly marked by the contrast between the trusts declared by clause 11 of the moneys received in the first case by the trustees, which, as already pointed out, exclude altogether the holders of debentures of the first series, and the trusts declared in clause 13 of the moneys received in the second case by any receiver, which are to be applied first in providing for the matters specified in the first three paragraphs of clause 8 of s. 24 of the Conveyancing Act, 1881, that is to say, among other things, in keeping down the interest on principal moneys having priority to the mortgage under which the receiver is appointed, or in other words the interest on the first series of debentures.

The following results seem to follow from the principles already stated: (*a*) that creditors cannot be made responsible for the liabilities of a business carried on for the purpose, among others, of securing and paying their debts, even though they may have considerable control: *Cox* v. *Hickman* (1); *Mollwo, March & Co.* v. *Court of Wards* (2); (*b*) that a receiver and manager appointed by a mortgagee under an agreement that he shall be the agent of the mortgagor is in the same position as if appointed by the mortgagor himself, and as if every direction given to him emanated from the mortgagor himself: *Jefferys* v. *Dickson* (3); (*c*) that a mortgagee is not made a mortgagee in possession by such an appointment, and would not be even if the mortgagor appointed him to receive income: *Parkinson* v. *Hanbury*. (4)

The appointment of a receiver by the writing of July 22, 1892, being to all intents and purposes an appointment by the

(1) 8 H. L. C. 268.
(2) L. R. 4 P. C. 419.
(3) L. R. 1 Ch. 183.
(4) L. R. 2 H. L. 1.

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company, the signature of it by the trustees involves them in no responsibility whatsoever. The case is just the same as though the appointment had been contained in the deed of May 18, 1892. As the appointment was accepted by the receiver and acted upon by the company's giving up possession to him, no question can arise as to its conformity with the power under which it purports to be made. Every direction in it, including the direction for opening an account with the banking firm of Goslings and Sharpe, the prompt payment of all moneys received into that account, and the counter-signature by Mr. Tryon of all receipts and cheques upon the banking account, are to be treated as emanating from the limited company. The account was therefore from the first not the account of Mr. Kelly in his private capacity, but of Mr. Kelly as fiduciary agent of a principal who had directed the account to be kept and operated upon in a particular manner for the benefit of the principal's mortgagees. The receiver could not, without breach of duty, discontinue or vary the mode of keeping the account; and the banking firm were not bound to honour cheques upon it without Mr. Tryon's signature. If they were asked to advance moneys to the receiver for the purposes of the account in the ordinary course of business, it was a matter solely for their consideration whether it was prudent for them to do so or not. It will be remembered that they offered to prove that they never made advances except on special security, and that there is no evidence to the contrary. But, even if they had advanced without security, and even if they are identified for every purpose with the trustees of the deed of May 18, 1892, the making of such advances could no more make them or the trustees liable for the carrying on of the business than similar conduct on the part of bankers of an ordinary trading firm. Neither the bankers nor the trustees had any power of interference with the management of the business. When they honoured cheques in favour of the plaintiffs, they only did what they were absolutely bound to do if Mr. Tryon countersigned the cheque. If they dispensed with his counter-signature, they may have run some risk of the moneys being misapplied; but as there is no suggestion that they were misapplied, the circum-

stance was of no importance. Finally, the receiver was appointed for the very purpose of securing payment of the interest on the second series of debentures. It was the duty of the receiver to pay this interest if he had funds in his hands so to do. It would be a matter of no importance, even if the bankers took for granted his assent to the debiting of his account with this interest; but, so far as the evidence goes, it appears that his assent was obtained beforehand.

The above analysis of the position shews, in my opinion, that, at any rate, down to the date of the winding-up order, the trustees of the deed of May 18, 1892, had not taken a single step which would have even a tendency to make them responsible to creditors of the business or to the receiver.

Did then the winding up of the company make them for the first time principals? No evidence is suggested of any interference by them after the date of the winding-up order, unless the continuing of the banking account should amount to such an interference, which is shewn above not to be the case. They could, no doubt, have made void the appointment of the receiver or entered into possession. So also could the trustees of the earlier deed in favour of the first series of debentures. Neither one nor the other set of trustees was under any obligation so to act, or could incur liability for omitting to do so. It has been already shewn that such interest as the trustees had in the moneys derived from carrying on the business could not make them liable as principals, having regard to the decisions in the House of Lords and Privy Council already dealt with. What, then, was the effect of the winding-up order? It could not give the company rights which it did not before possess; for instance, the right of revoking the appointment of the receiver, or withdrawing from his control and management any of the property committed to him, that being the property, first of all, of the debenture-holders, and only belonging to the company as to the equity of redemption expectant on the mortgages to them. But, even if there were any such right on the part of the company, its non-exercise could not make the trustees principals. No doubt the company was incapacitated by the winding-up order from carrying on business, and the receiver

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could not create debts which would be provable in the liquidation against the unmortgaged assets of the company—that is to say, the uncalled capital, if any there were. In other words, he could no longer pledge the credit of the company. But it seems that he could realize the trade assets and employ them in further trading so long as he was not stopped by the trustees for any of the debenture-holders. If he chose to buy goods for the purposes of the business, he might do so, and under the deed of May 18, 1892, had a right to be indemnified by applying any part of the mortgaged property, that is to say, any part of the company's property other than the uncalled capital, if any, in satisfaction of the debts so incurred. He is not a party to this action, and it would not be right to decide whether he was personally liable or not, though it might fairly be argued that he was personally liable, being in the position of a person professing to act for a principal who cannot himself be principal; but, if he paid the debts, he could recoup himself out of the assets, and, if he was unable to do so, and were made bankrupt, the trade creditors might ultimately be entitled to stand in his shoes against those assets. This, again, is a point which, however plain, ought not to be decided here, as the Court has no jurisdiction to decide it. The existence, however, of such a probability is a sufficient answer to the suggestion that the trade creditors must have a right against the defendants in this action, because otherwise they are without remedy. Such a conclusion, even if the want of any other remedy could be established, would not, as a matter of law, follow. On all the above grounds, the action of the plaintiffs, in my judgment, fails; and, if the case depended upon my judgment, the appeal ought to be allowed.

Appeal dismissed.

Solicitor for plaintiffs: *Cecil F. Rawlinson.*

Solicitors for defendants: *Saltwell, Tryon & Saltwell.*

E. L.

END OF VOL. I.

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4. —— *Costs—Set-off—Practice—Bankruptcy Rules*, 1886, *r.* 353—*Rules of the Supreme Court, Order LXV., rr.* 14, 27, *sub-r.* 21.] Costs of an appeal from a county court to the High Court in proceedings in the winding-up of a company cannot be set off against costs of an appeal from a county court to the High Court in bankruptcy proceedings, although the two appeals are between the same parties.—*Ex parte Griffin* (14 Ch. D. 37) followed. *In re* BASSETT. *Ex parte* LEWIS 219

5. —— *Member of Committee of Inspection—"Profit derived from Transaction arising out of the Bankruptcy"—Sanction of Court—Solicitor to Trustee—Bankruptcy Rules*, 1886, *r.* 317.] By rule 317 of the Bankruptcy Rules, 1886, "No member of a committee of inspection of an estate shall, except under and with the sanction of the Court, directly or indirectly, . . . be entitled to derive any profit from any transaction arising out of the bankruptcy, or to receive out of the estate any payment for services rendered by him in connection with the administration of the estate":—*Held*, that the sanction of the Court under this rule cannot be given after the profit has been derived, but must be obtained before the business from which the profit is to be derived is undertaken:—*Held*, also (reversing the decision of Vaughan Williams J.), that the "profit derived" by a solicitor is the amount of his costs, less his disbursements out of pocket in the particular matter, and that no allowance can be made to him in respect of his general office expenses.—*Per* Lord Esher M.R.: When one of the members of a committee of inspection is the managing clerk of a solicitor, though it is not a breach of rule 317 to appoint that solicitor to be solicitor to the trustee in the bankruptcy, yet on general principles such an appointment would be improper, and would be set aside by the Court on application for the purpose. *In re* GALLARD. *Ex parte* GALLARD - - - C. A. 68

6. —— *Mortgage of Chose in Action—Notice—Order and Disposition—Protected Transaction—Delay in making Claim—Costs—Bankruptcy Act*, 1883, *c.* 52, *ss.* 44, 49.] In 1890 A. by deed assigned to a company the moneys to become due to him under a contract with the War Office to secure the payment of 30*l.* No notice of this deed was given to the War Office. In May 1892, A. committed an act of bankruptcy, and a receiving order was made against him in August

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1892. On June 24, 1892, A. by deed assigned the same moneys under the same contract to the company to secure the payment of 74*l.*, which sum in fact included the previous 30*l.* Notice of this deed was at once given to the War Office by the company, who were not aware of the act of bankruptcy. In November, 1893, the trustee in bankruptcy rejected the claim of the company to be secured creditors, and informed them that he should shortly receive from the War Office the money due under the contract. The company took no step to assert their claim until December, 1895:—*Held*, first, that the delay of two years did not under the circumstances amount to an abandonment by the company of their claim; secondly, that the notice to the War Office was equivalent to taking possession of the subject-matter of the assignment, and, coupled with the deed of June, 1892, was a dealing for valuable consideration, and therefore a protected transaction within s. 49 of the Bankruptcy Act, 1883; and, thirdly, that the company, having taken possession by their notice, could then set up both their deeds of assignment. *In re* SEAMAN. *Ex parte* FURNESS FINANCE COMPANY - 412

7. —— *Petition—Petitioning Creditor's Debt —"Liquidated Sum, payable either immediately or at some certain future time"—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 6, *sub-s.* 1 (*b*).] A debtor, who owed 100*l.* for money lent, accepted a bill of exchange at three months for that amount and interest, and the creditor signed a letter agreeing that the bill should be renewed, provided the interest was paid from time to time. The interest on the first bill was paid, and the bill was renewed. Before the second bill became payable the debtor committed an act of bankruptcy, and the creditor presented a bankruptcy petition against him.—On appeal from an order dismissing the petition:—*Held*, that the debt of 100*l.* was "a liquidated sum, payable either immediately or at some certain future time," within the meaning of s. 6, sub-s. 1 (*b*), of the Bankruptcy Act, 1883, and therefore the creditor was entitled to present the petition, and a receiving order ought to be made. *In re* BARR. *Ex parte* WOLFE - - - - 616

8. —— *Receiving Order—Absence of Assets—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 3.] It is not a sufficient cause for refusing to make a receiving order in bankruptcy that the debtor has apparently no assets for distribution among his creditors. *In re* LEONARD. *Ex parte* LEONARD - - - - C. A. 473

9. —— *Taxation of Costs of Trustee's Solicitor —Right of Official Receiver to attend—Bankruptcy Rules*, 1886 *and* 1890, *r.* 122.] An official receiver has no right, without the leave of the Court, to be present at the taxation of the bill of costs of the solicitor of a trustee in bankruptcy. The registrar or the judge (as the case may be) may, however, if he thinks fit, give the official receiver leave to attend such taxation, not as a litigant, but merely for the purpose either of assisting the trustee or the taxing master by his advice, or of enabling him to report on the taxation to the Board of Trade. *In re* NASH & SONS. *Ex parte* CROFTON, CRAVEN & WORTHINGTON 13

BANKRUPTCY—*continued.*

10. —— *Trustee—Appointment of—Practice —Objection by Board of Trade—Costs—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 21, *sub-s.* 2.] When the Board of Trade at the request of a majority of the creditors notify to the Court, under s. 21 of the Bankruptcy Act, 1883, their objection to the appointment of a trustee in bankruptcy, the Court will not exercise any discretion in the matter on the merits of the case, but will only decide whether the objection is on the facts valid in point of law.—The fact that the trustee appointed by the creditors is an accounting party to the estate, and will as trustee have to investigate his own account, is of itself a valid objection.—*In re Lamb* ([1894] 2 Q. B. 805) discussed and followed.—When the Board of Trade object to the trustee appointed by the creditors, and at the request of the creditors notify that objection to the Court, and the creditors alone appear bonâ fide to oppose the objection of the Board of Trade, costs will not as a rule be given against the trustee although the objection is upheld. *In re* MARDON - - - - - 140

11. —— *Trustee—Unclaimed or undistributed Funds—Liability to account—Board of Trade—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 162 *—Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *ss.* 1, 8.] By s. 162, sub-s. 2 (*a*), of the Bankruptcy Act, 1883, where, after the passing of the Act, any unclaimed or undistributed funds or dividends in the hands of any trustee empowered to collect, receive, or distribute any funds or dividends under any Act of Parliament mentioned in the fourth schedule, or any petition, resolution, deed, or other proceeding under or in pursuance of such Act, have remained or remain unclaimed or undistributed for six months after the same became claimable or distributable, or in any other case for two years after the receipt thereof by such trustee, it shall be the duty of such trustee forthwith to pay the same to the Bankruptcy Estates Account at the Bank of England. (*b*) The Board of Trade may at any time order "such trustee" to submit to them an account verified by affidavit of the sums received and paid by him under or in pursuance of any such petition, resolution, deed, or other proceeding:—*Held*, that the Board of Trade were entitled to enforce an order for an account against a trustee under this section without proving that he had had in his hands, after the passing of the Act, any unclaimed or undistributed funds or dividends.—Decision of Queen's Bench Division ([1895] 2 Q. B. 634) affirmed.—Sect. 8 of the Trustee Act, 1888, does not apply to a trustee in bankruptcy. *In re* CORNISH. *Ex parte* BOARD OF TRADE - - - - - C. A. 99

12. —— *Undischarged Bankrupt—After-acquired Property—Letters Patent—Royalties—Personal Earnings—Judgment of County Court—Estoppel—Solicitor's Lien for Costs—Bankruptcy Act*, 1883, *ss.* 44, 53.] The principles which underlie s. 53 of the Bankruptcy Act, 1883, with respect to the "salary or income" of a bankrupt, are also applicable to his "personal earnings." In each case it is a question of amount, and he will be allowed to retain only such a sum as is sufficient for the reasonable maintenance of him-

BANKRUPTCY—*continued.*
self and his family, and the residue will pass to his trustee in bankruptcy. An undischarged bankrupt took out letters patent for an invention, and granted a licence to a company to work the patented invention at a royalty of 10*l.* per week. Two instalments of the royalty, i.e., 20*l.*, becoming payable were claimed by the trustee in bankruptcy as after-acquired property of the bankrupt. The company took out an interpleader summons in the High Court, which was remitted to a county court for decision. The county court judge held that the 20*l.* was in the nature of personal earnings and belonged to the bankrupt, and refused leave to appeal. Subsequent royalties became due, and the trustee applied to the Bankruptcy Court for a declaration that they vested in him as after-acquired property of the bankrupt:—*Held*, that the judgment of the county court estopped the trustee from asserting that the royalties were not the personal earning of the bankrupt, but that 5*l.* a week was a fitting sum for the reasonable maintenance of the bankrupt and his family, and that the residue passed to the trustee in bankruptcy:—But *held*, also, that the solicitor of the bankrupt had as against the trustee a first charge for his costs of creating the fund, i.e., his costs properly incurred in taking out and maintaining the letters patent and carrying through the arrangements with the company. —*Semble*, the royalties were not the "personal earnings" of the bankrupt. *In re* GRAYDON. *Ex parte* THE OFFICIAL RECEIVER - - 417

BANKRUPTCY RULES, 1886, r. 353 - 219
See BANKRUPTCY. 4.

BASTARDY—*Jurisdiction—Absence from England of alleged Father—Ceasing to reside in England within the Twelve Months next after the Birth—Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 3.] By s. 3 of the Bastardy Laws Amendment Act, 1872, an affiliation summons may be applied for either before the birth of the child "or at any time within twelve months from the birth of such child . . . . or at any time within the twelve months next after the return to England of the man alleged to be the father of such child, upon proof that he ceased to reside in England within the twelve months next after the birth of such child."—The alleged father of a bastard child left England about a month before the child's birth and did not return till the child was fifteen months old. The mother then took out a summons which was dismissed for want of jurisdiction on the ground that the summons was out of time:—*Held*, that the alleged father ceased to reside in England during the whole period of his absence; that he was therefore a person who had "ceased to reside in England within the twelve months next after the birth of such child" within the meaning of s. 3 of the Act of 1872, and that the justices had jurisdiction to adjudicate upon a summons taken out within twelve months after his return. THE QUEEN *v.* EVANS [228

2. —— *Service of Summons—Putative Father out of Jurisdiction—"Last Place of Abode"—Bastardy Laws Amendment Act*, 1872 (35 & 36 *Vict. c.* 65), *s.* 4.] By the Bastardy Laws Amendment Act, 1872, s. 4, after the birth of a bastard child, on proof that the summons was left at the last place of abode of the person summoned, six days at least before the petty session, the justices may make an order.—Shortly after the birth of a child the person alleged to be the father left the house where he had up to that time resided, and went to America, but the evidence did not shew that he had any place of abode in America. Ten days after the birth a summons was left at the house where he had resided:—*Held*, that this house was his last place of abode within the meaning of the Act, and the service was sufficient. —Dictum of Lord Selborne in *Berkley* v. *Thompson* (10 App. Cas. 45, at p. 49) explained and distinguished. THE QUEEN *v.* WEBB - - 487

BETTING—Place used for purposes of - 295
See GAMING.

—— Using streets for—By-law—Validity 641
See MUNICIPAL CORPORATION.

BILL OF EXCHANGE—*Forged Indorsement—Payment to bonâ fide Holder—Right to recover Money.*] When a bill becomes due and is presented for payment, and is paid in good faith and the money is received in good faith, if such an interval of time has elapsed that the position of the holder may have been altered, the money so paid cannot be recovered from the holder, although indorsements on the bill subsequently prove to be forgeries. LONDON AND RIVER PLATE BANK *v.* BANK OF LIVERPOOL - - - - 7

2. —— *Promissory Note—Document containing unnecessary Provisions—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *s.* 83, *sub-s.* 3.] The plaintiff sued as indorsee of a document, described as a promissory note, which provided for payment of certain money by instalments, the whole to become due on default in payment of any one instalment and contained the following clause: "No time given to, or security taken from, or composition or arrangements entered into with, either party hereto, shall prejudice the rights of the holder to proceed against any other party":—*Held*, that the document was not a promissory note, and could not be sued on as such. KIRKWOOD *v.* SMITH - - - 582

—— Order on banker to transfer in account—Stamp - - - - 542
See REVENUE. 7.

BUILDINGS—Right to build beyond general line of - - - - 465
See METROPOLIS MANAGEMENT ACTS. 2.

BY-LAW — Reasonableness — Requirement to shew ticket - - - 253, 256
See TRAMWAY. 1, 2.

—— Reasonableness—Use of profane or obscene language - - - - 290
See LOCAL GOVERNMENT. 1.

CAPITATION GRANT—Loss of—Rule ultra vires
See VOLUNTEER CORPS. 665

CASES—*Attorney-General* v. *Bouwens* (4 M. & W. 171) followed - - - 211
See REVENUE. 9.

CASES—*continued.*

—— *Auckland (Lord)* v. *Westminster District Board of Works* (L. R. 7 Ch. 597) distinguished - - - - 465
See METROPOLIS—MANAGEMENT ACTS. 2.

—— *Berkley* v. *Thompson* (10 App. Cas. 45) dictum at p. 49 explained and distinguished - - - - 487
See BASTARDY. 2.

—— *Enniskillen (Guardians of)* v. *Hilliard* (14 L. R. Ir. 214) approved - - 83
See MARGARINE.

—— *Griffin, Ex parte* (14 Ch. D. 37) followed
See BANKRUPTCY. 4. 219

—— *Lamb, In re* ([1894] 2 Q. B. 805) discussed and followed - - - 140
See BANKRUPTCY. 10.

—— *Neilson* v. *Wait* (16 Q. B. D. 67) distinguished - - - - 586
See SHIP. 2.

—— *Parsons* v. *Birmingham Dairy Co.* (9 Q. B. D. 172) disapproved - - - 83
See MARGARINE.

—— *Peek* v. *Gurney* (L. R. 6 H. L. 377) distinguished - - - - - 372
See COMPANY. 2.

—— *Pletts* v. *Campbell* ([1895] 2 Q. B. 229) distinguished - - - - 519
See LICENSING ACTS. 1.

CERTIFICATE—Analyst—Evidence 202, 287
See ADULTERATION. 1, 2.

CHARTERPARTY—"Port charges"—Light dues
See SHIP. 1. 20

—— "Safe port" - - - - 586
See SHIP. 2.

CHILD—Employment of—Cleaning machinery
See FACTORY ACTS. 244

COAL—Sale of, from vehicle—By-law—Validity
See LOCAL GOVERNMENT. 6. 636

COMMERCIAL CAUSE—Leave to enter in list before appearance of defendant - 208
See PRACTICE. 1.

COMMITTEE OF INSPECTION—Bankruptcy—"Profit derived from transaction arising out of the bankruptcy" - - 68
See BANKRUPTCY. 5.

COMPANY—*Debentures—Trustees for Debentureholders—Receiver—Principal and Agent—Liability for Goods ordered by Receiver.*] By a deed made between a limited company and the defendants as trustees for debenture-holders, by which the business and property of the company were mortgaged to secure payment of the debentures, it was provided that in certain events the trustees might by writing under their hands appoint a receiver of mortgaged premises, who should have power to carry on the business, and that any receiver so appointed should be the agent of the company, who alone should be liable for his acts and defaults. The defendants were two of the members of a banking firm, who were the holders of the debentures. They appointed a receiver under the deed, stipulating that all moneys received by him as receiver should on the day of their receipt be paid in to an account to be opened by him with the banking firm, and that cheques drawn by him upon the account should be countersigned by their solicitor. Shortly after the appointment of the receiver an order was made for the compulsory winding up of the company. Subsequently to the winding-up order, the receiver continued to carry on the business, and in the course of so doing ordered goods from the plaintiffs. In an action against the defendants for the price of the goods:—*Held*, by Lord Esher M.R. and Lopes L.J., Rigby L.J. dissenting, that the correct inference was that, at any rate after the winding-up order, the defendants were the principals for whom the receiver, as agent, carried on the business, and consequently the action was maintainable against them. GASKELL *v.* GOSLING - - - **C. A. 669**

2. —— *Misrepresentation—Prospectus—Intention to induce Purchase of Shares—Liability to Purchaser—Publication of False Statements confirming those of Prospectus—Purchase of Shares by Person who had received Prospectus—Liability of Person causing Publication.*] Where the object with which the prospectus of a company is issued is not merely to induce application for an allotment of shares, but also to induce persons to whom it is sent to purchase shares in the market, its function is not exhausted when the company has gone to allotment, and the person issuing the prospectus is responsible for the consequences of a false representation contained in it, and known to him at the time to be false, to any person to whom the prospectus has been sent who is induced by the false representation to purchase shares, and thereby sustains a loss. *Peek* v. *Gurney* (L. R. 6 H. L. 377) distinguished. Where a person who has issued the prospectus of a company, containing a false representation, known to him at the time to be false, subsequently causes to be published a false representation to the same effect as that of the prospectus, with the direct intent of inducing persons to purchase shares in the company, he is responsible for the consequences of so doing to any one who, having received a prospectus, purchases shares on the faith of the false representation so published, and thereby sustains a loss. ANDREWS *v.* MOCKFORD [**C. A. 372**

COMPENSATION — For crops — Allotment and cottage gardens - - - 562
See LANDLORD AND TENANT. 1.

—— Measure of—Earnings of apprentice 453
See EMPLOYERS' LIABILITY ACT.

CONCEALMENT—Insurance (marine)—Warranty against average — Concealment of material fact - - - 123
See SHIP. 3.

CONTEMPT OF COURT—*Publication tending to influence Result of Proceedings—Newspaper Comments.*] An application was made for an attachment against the respondents, for contempt of Court in publishing certain articles in a newspaper. It appeared that the applicant, who had been sub-editor and manager of the paper, was charged with attempted arson, and remanded. An article was then published in the paper, alluding to the facts that the property of the

CONTEMPT OF COURT—*continued.*
newspaper company was for sale, and that the applicant had been arrested, and the charge of arson was pending. That charge was dismissed, but others were preferred, on two of which the applicant was committed for trial. While he was awaiting trial an article was published, announcing that one of the respondents had purchased the paper, and appealing for support, and alluding to the charges pending against the applicant, and shortly afterwards a report was published of a meeting of a committee of a county council, at which a resolution was carried that the action of the chief constable in obtaining legal assistance for the police in the case of the prosecution pending against the applicant should be confirmed:—*Held*, that the publications in question did not appear to be intended, and were not calculated, to prejudice the fair trial of the charges pending against the applicant, and therefore no attachment ought to issue. THE QUEEN *v.* PAYNE AND COOPER - - - 577

CONTRACT — Joint or several — Insurance (marine) — Policy — Subscription by syndicate - - - - 135
See INSURANCE (MARINE). 2.

—— Procuring breach of—Proof of damage 147
See COPYRIGHT.

CONTRACTOR—Liability of principal for negligence of—Public body - - 335
See PRINCIPAL AND AGENT.

CONTRIBUTION—Co-sureties—Material alteration of instrument—Discharge - 75
See PRINCIPAL AND SURETY.

CONTRIBUTORY NEGLIGENCE—Level crossing —Gatekeeper's duty - 178, 189, n.
See RAILWAY. 1, 2.

CONVEYANCE—By mortgagor under foreclosure order—Stamp - - - 422
See REVENUE. 6.

COPYRIGHT—*Infringement—Injunction — Right of Property in Unpublished Information—Action, cause of—Procuring Breach of Contract—Proof of Damage.*] In order to support an action for maliciously inducing persons to break their business contracts with the plaintiff proof of specific damage need not be given; it is sufficient to prove facts from which it may properly be inferred that some damage must result to the plaintiff from the defendant's wrongful acts.—Under a contract made between the plaintiffs and the committee of the London Stock Exchange, valuable information as to the prices of stocks and shares from time to time during the day was collected on the Stock Exchange, and supplied to the plaintiffs, and printed on tapes and sheets of letterpress in their office. The defendant, having surreptitiously obtained such information, published it in the same form before its publication by the plaintiffs:—*Held*, that the plaintiffs had a right of property at common law in the information, and were entitled to an injunction to restrain the defendant from infringing that right by continuing to publish it. EXCHANGE TELEGRAPH COMPANY *v.* GREGORY & CO. - - C. A. 147

COSTS—Application to enter cause in commercial list before appearance of defendant 208
See PRACTICE. 1.

COSTS—*continued.*
—— Appointment of trustee—Objection by Board of Trade - - - - 140
See BANKRUPTCY. 10.

—— Bankruptcy—Costs of solicitor to trustee—Right of official receiver to attend taxation - - - - - 13
See BANKRUPTCY. 9.

—— County Court—Remitted action—Taxation
See COUNTY COURT. 2. 246

—— Delay in making claim - - 412
See BANKRUPTCY. 6.

—— Fees to counsel—Special allowance where no local Bar - - - 393
See COUNTY COURT. 1.

—— Order for payment of costs by solicitor—Action - - - - 48
See PRACTICE. 3.

—— Set-off—Two appeals—Practice - 219
See BANKRUPTCY. 4.

—— Solicitor—Reversal of judgment—Repayment of costs - - - 610
See PRACTICE. 2.

—— Solicitor's lien for—Taking out letters patent - - - - 417
See BANKRUPTCY. 12.

COUNSEL—Fees to—Special allowance where no local Bar - - - - 393
See COUNTY COURT. 1.

COUNTY COUNCIL—By-law—Reasonableness—Use of profane or obscene language 290
See LOCAL GOVERNMENT. 1.

COUNTY COURT—*Costs — Fees to Counsel — Special Allowance where no local Bar.*] In a taxation of costs in a county court on the higher scale, the special item No. 86 which may be allowed by order of the judge to counsel where there is no local bar in, or within twenty miles of, the court town, can only be allowed once in the same case, although the counsel engaged may have been present in court on more than one occasion. ATKINSON *v.* MAYOR, &C., OF CARLISLE [393

2. —— *Costs—Practice—Taxation—Remitted Action—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *ss.* 65, 118.] The provision of s. 118 of the County Courts Act, 1888, which prevents the recovery by a solicitor from his client of costs incurred in a county court, unless they have been allowed on taxation, only relates to cases in which there is an application for taxation. Therefore the solicitor may recover such costs without taxation, where there has been no application for it, and the client is no longer entitled to taxation.—By Lord Esher M.R. and Lopes L.J.: Where an action in the High Court has been remitted to the county court, the above-mentioned provision of the County Courts Act, 1888, does not affect a solicitor's right to recover the costs incurred in the High Court before the order remitting the action. CUBISON *v.* MAYO - - C. A. 246

3. —— *Jurisdiction—Arrears of Rent-charge —Action by Trustees of Charity—Prohibition— Title in Question—Charitable Trusts Act*, 1853 (16 & 17 *Vict. c.* 137), *s.* 41—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 60.] The plaintiffs,

COUNTY COURT—*continued.*
trustees of a charity, sued in the county court to recover arrears of a rent-charge of 10*l.* a year issuing out of the defendants' land. The summons referred to the Charitable Trusts Act, 1853, and leave to proceed had been obtained under that Act.—On an application for a prohibition:—*Held*, that the action was not "proceedings under this Act," within the meaning of s. 41 of the Charitable Trusts Act, 1853, and therefore the jurisdiction of the county court was not excluded by that section:—*Held*, also, that the title which came in question, within the meaning of s. 60 of the County Courts Act, 1888, was the title to the rent-charge, not the title to the land, and therefore the value of the hereditaments in dispute did not exceed 50*l.* by the year, and the county court had jurisdiction. BASSANO *v.* BRADLEY - 645

4. —— *Remitting Action to — Practice — Transfer of Action, when made—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 66.] Where an order has been made for the remission of an action to a county court under the County Courts Act, 1888, s. 66, the action remains in the High Court until the plaintiff has lodged the original writ and the order with the registrar of the county court in accordance with the section; and, consequently, until that has been done the High Court still has jurisdiction to make an interlocutory order in the action. D'ERRICO *v.* SAMUEL [C. A. 163

COVENANT—Not to carry away hay and straw —Penalty - - - - 626
See LANDLORD AND TENANT. 2.

CRIMINAL LAW—*Cruelty to Animals*—"*Domestic Animal*"—*Tame Seagull—Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *ss.* 2, 29—*Cruelty to Animals Act*, 1854 (17 & 18 *Vict. c.* 60), *s.* 3.] The respondents were charged, under the Cruelty to Animals Act, 1849, s. 2, with cruelly ill-treating a tame seagull. The bird had been the property of its owner for three years, and was used by her in her business as a photographer. It was tame, and was kept in a field. One wing having been pinioned, it could not fly, but could get out of the field by going down a river. It would go to its owner when called, and feed from the hand:—*Held*, that the seagull was not a "domestic animal," within the meaning of the Cruelty to Animals Acts, 1849, s. 29, and 1854, s. 3, and therefore the respondents could not be convicted. YATES *v.* HIGGINS - - - - 166

2. —— *Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 13, *sub-s.* 2—*Intent to defraud Creditors.*] A plaintiff in an action to recover unliquidated damages is not until recovery of judgment a "creditor" of the defendant within the meaning of s. 13, sub-s. 2, of the Debtors Act, 1869, which makes it a misdemeanour for any person to make any gift, delivery, or transfer of or any charge upon his property with intent to defraud his creditors or any of them.—A defendant to such an action, who has, during the pendency of the action but before judgment, given a bill of sale over his furniture with intent to defeat any judgment which the plaintiff may obtain, cannot therefore be convicted under that sub-section of having made a charge on his property with intent

CRIMINAL LAW—*continued.*
to defraud the plaintiff in the action. THE QUEEN *v.* HOPKINS AND FERGUSON - - C. C. R. 652

3. —— *Extradition—Falsification of Accounts* —"*Faux*"—"*Faux en Ecritures de Commerce*—*Extradition Treaty with France*, *Art.* 3 (2, 18)—*Code Pénal*, *Art.* 147—*Larceny Act*, 1861 (24 & 25 *Vict. c.* 96), *s.* 83—*Falsification of Accounts Act*, 1875 (38 & 39 *Vict. c.* 24).] The offence in English law of fraudulent falsification of accounts by a director, public officer, or member of a public company is an offence within art. 147 of the French Code Pénal, and is covered by the expression "faux en écritures de commerce" in that article. Although it may not amount to forgery according to English law, that offence is an extradition crime within the French version of art. 3 (2) of the extradition treaty with France, and within the English version of art. 3 (18) of the same treaty, and also within the Extradition Acts. *In re* ARTON (No. 2) - - - 509

4. —— *Extradition—Jurisdiction—Bona fides of Demand for Surrender—Offence of a Political Character—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *s.* 3, *sub-s.* 1.] Where the surrender of a fugitive criminal is demanded by the Government of a friendly State for offences within the provisions of the Extradition Act, 1870, and of the extradition treaty with that State, the Court has no jurisdiction to inquire whether the demand for surrender is made in good faith and in the interests of justice.—The provision of s. 3, sub-s. 1, of the Extradition Act, 1870, by which a fugitive criminal shall not be surrendered if he proves to the satisfaction of the Court that the requisition for his surrender has been made with a view to try or punish him for an offence of a political character, applies only to an offence of a political character which has been already committed. *In re* ARTON - - - - - 108

5. —— *Extradition — Surrender of British Subjects—Treaty with Belgium—Person "liable to be surrendered"—Extradition Act*, 1870 (33 & 34 *Vict. c.* 52), *s.* 6.] By s. 6 of the Extradition Act, 1870, "where this Act applies in the case of any foreign State, every fugitive criminal of that State, who is in or suspected of being in any part of Her Majesty's dominions . . . . shall be liable to be apprehended and surrendered in manner provided by this Act."—By a treaty made between this country and Belgium the contracting parties undertook to deliver up to each other reciprocally fugitive offenders accused of certain specified offences; but it was expressly provided that "in no case, nor on any consideration whatever, shall the high contracting parties be bound to surrender their own subjects, whether by birth or naturalization."—The surrender of a British subject was demanded by the Belgian Government in respect of certain extradition offences of the commission of which there was sufficient primâ facie evidence to justify his extradition, and an order for his committal was made by a magistrate with a view to his surrender:—*Held*, that the accused, although a British subject, was a person "liable to be surrendered" within the meaning of s. 6 of the Extradition Act, 1870, and that the order of committal was rightly made.—Under the provisions of the treaty with Belgium,

CRIMINAL LAW—*continued.*
the ordinary proceedings in extradition may be taken in the case of a British subject; it is not necessary that in each particular case the surrender should be the result of negotiations between the respective Governments and of an express consent by the British Government to the extradition. *In re* GALWEY - - 230

6. —— *Obtaining Money by Forged Instrument — Forged Telegram — Forgery Act*, 1861 (24 & 25 *Vict. c.* 98), *s.* 38.] The prisoner was indicted under s. 38 of the Forgery Act, 1861, for obtaining certain money by means "of a certain forged instrument, to wit, a forged telegram." It appeared that the prisoner, who was a clerk in a post office, sent to a bookmaker a telegram offering a bet on a certain horse for a certain race. The telegram purported to have been handed in prior to the running of the race, and the bookmaker accepted the bet and ultimately paid the amount won on that understanding. In reality the telegram was despatched by the prisoner after he had received the news that the race had been won by the horse in question:—*Held*, by Hawkins, Mathew and Wills JJ. (Lord Russell of Killowen C.J. and Vaughan Williams J. doubting), that the telegram was a forged instrument within the meaning of s. 38, and that the indictment was good. THE QUEEN *v.* RILEY - C. C. R. 309

7. —— *Procuring Commission of Act of Gross Indecency — "Another male person" — Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 11.] By s. 11 of the Criminal Law Amendment Act, 1885, "any male person who . . . . procures . . . . the commission by any male person of any act of gross indecency with another male person shall be guilty of a misdemeanour":—*Held*, that where the prisoner had procured the commission by another male person of an act of gross indecency with the prisoner himself the offence was complete. THE QUEEN *v.* JONES AND BOWERBANK [C. C. R. 4

CROSS-EXAMINATION—Unstamped document
See EVIDENCE. 2. 325

CROWN, PREROGATIVE OF—*Civil Service—Tenure of Office—Power of Dismissal at Pleasure.*] Servants of the Crown, civil as well as military, except in special cases where it is otherwise provided by law, hold their offices only during the pleasure of the Crown. DUNN *v.* THE QUEEN [C. A. 116

2. —— *Military Service—Engagement made with Military Officer by the Crown—Petition of Right.*] No engagement made by the Crown with any of its military or naval officers in respect of services either present, past, or future, can be enforced in any court of law. MITCHELL *v.* THE QUEEN - - - - C. A. 121, n.

DAMAGE—Proof of—Procuring breach of contract - - - - - 147
See COPYRIGHT.

DAMAGES—Remoteness—Public body - 335
See PRINCIPAL AND AGENT.

DEBTORS ACT—Intent to defraud creditors 652
See CRIMINAL LAW. 2.

DISEASES OF ANIMALS ACT—*Right of Private Person to prefer Information—Diseases of Animals Act*, 1894 (57 & 58 *Vict. c.* 57).] A private person may prefer informations under the Diseases of Animals Act, 1894, and the Orders made under that Act, for the right to enforce such Act and Orders is not confined to the local authority. THE QUEEN *v.* STEWART - - - - 300

DOG LICENCE—Certificate of exemption—Duty of justices - - - - 305
See REVENUE. 1.

DUTY—Public revenue.
See Cases under REVENUE.

ELECTION—Married woman—Qualification—Ownership of property in parish 238
See LOCAL GOVERNMENT. 4.
—— Parochial elector—Parish in parliamentary borough—Freeman - - 54
See LOCAL GOVERNMENT. 5.

ELECTION FOR PARLIAMENT.
See Cases under PARLIAMENT.

EMPLOYERS' LIABILITY ACT—*Measure of Compensation—Earnings of Apprentice*—43 & 44 *Vict. c.* 42, *s.* 3.] By the Employers' Liability Act, 1880, s. 3, the amount of compensation recoverable under the Act is limited to a sum equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade, employed during those years in the like employment, and in the district in which the workman is employed. The plaintiff was apprenticed to the defendants, and received a salary of 1*s.* a week for the first year, increasing 1*s.* a week each year. In the fifth year, when he was earning 5*s.* a week, he was injured, and brought an action to recover compensation under the Act. Evidence was given that at the end of the fifth year, when the plaintiff would be out of his apprenticeship, he would be able to earn from 14*s.* to 18*s.* a week, and the compensation was assessed at 80*l.*:—*Held*, that the amount which the plaintiff could earn when out of his apprenticeship could not be taken into consideration, but only the amount of his actual earnings as an apprentice; and the amount of the judgment must therefore be reduced. NOEL *v.* REDRUTH FOUNDRY COMPANY - - - 453

EVIDENCE—*Bankers' Books—Legal Proceeding in England—Order to inspect Bankers' Books in Scotland—Practice—Bankers' Books Evidence Act*, 1879 (42 & 43 *Vict. c.* 11), *ss.* 7, 10.] In a legal proceeding in England, the Court or a judge has power, under s. 7 of the Bankers' Books Evidence Act, 1879, on the application of any party to the proceeding, to order that such party shall be at liberty, for the purposes of such proceeding, to inspect and take copies of any entries in a banker's book in either of the other divisions of the United Kingdom. KISSAM *v.* LINK [C. A. 574

2. —— *Unstamped Document — Cross-examination—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 14, *sub-s.* 4.] In an action for money lent, an insufficiently stamped promissory note, purporting to be signed by the defendant and expressed to be given for money lent, was put into the defend-

EVIDENCE—*continued.*
ant's hands by the plaintiffs' counsel for the purpose of refreshing his memory and obtaining from him an admission of the loan:—*Held*, that the plaintiffs were entitled to use the note for that purpose, notwithstanding the provision of the Stamp Act, 1891, that an instrument not duly stamped "shall not be given in evidence or be available for any purpose whatever." BIRCHALL *v.* BULLOUGH - - - - - 325
—— Certificate of analyst - - 202, 287
See ADULTERATION. 1, 2.

EXECUTION—Award—Act of bankruptcy 368
See BANKRUPTCY. 1.

EXTRADITION—Criminal law—Jurisdiction—Bonâ fide demand for surrender—Offence of a political character - - 108
See CRIMINAL LAW. 4.
—— Falsification of accounts - - 509
See CRIMINAL LAW. 3.
—— Person "liable to be surrendered" - 230
See CRIMINAL LAW. 5.

FACTORY ACTS—*Employment of Children—Cleaning Machinery—Factory and Workshop Act*, 1878 (41 & 42 *Vict. c.* 16), *s.* 9.] By s. 9 of the Factory and Workshop Act, 1878, "a child shall not be allowed to clean any part of the machinery in a factory while the same is in motion by the aid of steam, water, or other mechanical power": —*Held*, that "the same" meant "the machinery" and not the "part" cleaned; so that this section prohibited allowing a child, while a machine was in motion, to clean any fixed part, which did not move, of the machine. PEARSON *v.* BELGIAN MILLS COMPANY - - - - 244

FIRE—Insurance against fire—Ship stranded and depreciated in value—Subsequent destruction by fire - - - 105
See INSURANCE (MARINE). 1.

FOOD AND DRUGS—Adulteration of.
See Cases under ADULTERATION.

FOREIGN COMPANY—Certificates of shares transferable in this country—Probate duty - - - - - 211
See REVENUE. 9.

FOREIGN MORTGAGE—Probate duty - 354
See REVENUE. 8.

FORGED TELEGRAM—Obtaining money by forged instrument - - - 309
See CRIMINAL LAW. 6.

FORGERY—Bill of exchange—Indorsement—Payment to bonâ fide holder—Right to recover money - - - 7
See BILL OF EXCHANGE. 1.

FRANCHISE.
See PARLIAMENT.

FREIGHT—Damage to goods—Loss of merchantable character—Liability to pay freight
See SHIP. 3. 123

GAMING—*Betting—Place used for Purposes of Betting*—16 & 17 *Vict. c.* 119, *s.* 3.] The respondent was in the habit of going to a certain piece
GAMING—*continued*
of ground, which was bounded on one side by a hoarding and on two other sides by stays supporting the hoarding, for the purpose of betting with persons resorting thereto:—*Held*, that the piece of ground was "a place" within the meaning of 16 & 17 Vict. c. 119, s. 3, and that the respondent ought to have been convicted under that section. LIDDELL *v.* LOFTHOUSE - - 295

GASWORKS—*Statutory Duty—Breach—Remedy—Whether Action lies—Supply of Gas—Gasworks Clauses Act*, 1871 (34 & 35 *Vict. c.* 41), *ss.* 11, 12, 36.] An action will not lie against a gas company, to which the provisions of the Gasworks Clauses Act, 1871, apply, for damages sustained by a consumer by reason of their failure to give him a supply of gas sufficient in amount and in purity to satisfy the requirements of the Act. The consumer's only remedy is to proceed for penalties under s. 36 of the Act. CLEGG, PARKINSON & Co. *v.* EARBY GAS COMPANY - 592

HIGHWAY—*Main road—Footways—Repair of in Urban Districts—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 13—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 11.] A county council is liable under the Local Government Act, 1888, s. 11, sub-s. 2, to contribute towards the costs of maintaining and repairing in an urban district the paved footways upon or at the sides of disturnpiked roads which have become main roads under the Highways and Locomotives (Amendment) Act, 1878, s. 13. *In re* MAYOR, &c., OF BURSLEM AND COUNTY COUNCIL OF STAFFORDSHIRE C. A. 24
—— Removal of obstructions - - 604
See LOCAL GOVERNMENT. 3.

HOUSE DUTY—School buildings - 432, 437
See REVENUE. 2, 3.

INCOME TAX—Assessment of profits or gains—Payment made to retiring manager of company - - - - 41
See REVENUE. 4.

INCORPORATED LAW SOCIETY—Jurisdiction of committee of - - - 327
See SOLICITOR.

INDECENCY—Criminal law—Procuring commission of act of indecency—"Another male person" - - - 4
See CRIMINAL LAW. 7.

INDUSTRIAL AND PROVIDENT SOCIETY—*Intestacy of Member—Power of Committee to distribute Property—Industrial and Provident Societies Act*, 1876 (39 & 40 *Vict. c.* 45), *s.* 11, *sub-s.* 6—*Industrial and Provident Societies Act*, 1893 (56 & 57 *Vict. c.* 39), *s.* 27.] By s. 27 of the Industrial and Provident Societies Act, 1893, if any member of a society entitled to property therein dies intestate without having made any nomination thereof then subsisting, the committee may without letters of administration distribute the same among such persons as appear to them on such evidence as they deem satisfactory to be entitled by law to receive the same:—*Held*, that

INDUSTRIAL AND PROVIDENT SOCIETY—*continued.*
the power of the committee to distribute the property was entirely discretionary, and that they could not be compelled by action to exercise their discretion. ESCRITT *v.* TODMORDEN CO-OPERATIVE SOCIETY - - - - - - 461

INDUSTRIAL SCHOOL—Justices—Jurisdiction
See JUSTICES. 64

INFORMATION—Right of private person to prefer - - - - - 300
See DISEASES OF ANIMALS ACT.

INFRINGEMENT—Copyright—Right of property in unpublished information 147
See COPYRIGHT.

INHABITED HOUSE DUTY—House "let in different tenements" - - - 169
See REVENUE. 5.

INJUNCTION—Copyright—Infringement—Right of property in unpublished information
See COPYRIGHT. 147

INSURANCE (MARINE)—*Insurance against Fire—Ship Stranded and Depreciated in Value—Subsequent Destruction by Fire.*] The plaintiffs' vessel was insured by the defendants by a valued time policy against loss or damage by fire. While so insured she stranded, and sustained such injuries that the cost of repairing her would have been greater than her value when repaired. Thirty-six hours afterwards she was completely destroyed by fire.—In an action by the plaintiffs on the policy:—*Held*, that the defendants were liable for the full amount for which they had insured the vessel. WOODSIDE *v.* GLOBE MARINE INSURANCE COMPANY - - - - 105

2. —— *Policy—Subscription by Syndicate—Contract whether Joint or Several.*] A number of underwriters, styling themselves the S. Syndicate, by their manager underwrote a policy of marine insurance, the form of their subscription of which was as follows: "The S. Syndicate. C., Manager." Then followed the names of the individual members of the syndicate, against each of which names was written a certain fractional proportion of the total sum insured. The policy contained a special clause entitling the assured "by way of security for the performance of the obligations of the subscribing underwriters and of each and every of them" to the benefit by way of charge upon any policies of reinsurance that might be effected by them. The policy was in other respects in the form of an ordinary Lloyd's policy, the assurers being thereby expressed to bind themselves "each one for his own part":—*Held*, that on the face of the policy the contract of the assurers was several and not joint, and that they were individually liable only for the proportions standing against their respective names. TYSER *v.* SHIPOWNERS SYNDICATE (REASSURED) - - - - - 135

—— Insurance of profit—Warranty against average—Concealment of material fact
See SHIP. 3. 123

INTESTACY—Member of society—Power to distribute property - - - 461
See INDUSTRIAL AND PROVIDENT SOCIETY.

JOINT OR SEVERAL LIABILITY—Marine Insurance—Policy—Subscription by syndicate - - - - - 135
See INSURANCE (MARINE). 2.

JURISDICTION—Bastardy—Absence from England of alleged father - - 228
See BASTARDY. 1.

JUSTICES—*Jurisdiction—Industrial Schools Act*, 1866 (29 & 30 *Vict. c.* 118), *s.* 14.] The Industrial Schools Act, 1866, does not contain a code of criminal procedure and is not punitive in its character, but is intended for the protection of children coming within its operation. Where, therefore, a child apparently under fourteen years of age is charged before a court of summary jurisdiction with larceny, and the charge is dismissed, but evidence is given that he frequents the company of reputed thieves, he may be sent to an industrial school under s. 14 of the Act, upon an application under that section, without being brought afresh before the Court by summons or otherwise. THE QUEEN *v.* JENNINGS - 64

—— Duty of—Dog licence—Certificate of exemption - - - - 305
See REVENUE. 1.

—— Jurisdiction—Margarine Act, 1887 - 83
See MARGARINE.

LANDLORD AND TENANT—*Compensation for Crops—"Allotment," what is—Allotments and Cottage Gardens Compensation for Crops Act*, 1887 (50 & 51 *Vict. c.* 26), *s.* 4.] By s. 4 of the Allotments and Cottage Gardens Compensation for Crops Act, 1887, "allotment" means (inter alia) "any parcel of land of not more than two acres in extent held by a tenant under a landlord and cultivated as a garden":—*Held*, that a piece of land less than two acres in extent, occupied by a seedsman for the purposes of his business, and having in it vegetables, fruit trees, and flowering plants which he sold, was not "cultivated as a garden," and was, therefore, not an "allotment" within the definition in s. 4. COOPER *v.* PEARSE [562

2. —— *Covenant not to carry away Hay and Straw—Penalty—Damages—Stipulations of varying Importance—Lease of Farm.*] Where a lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises during the last twelve months of the term, but to consume the same upon the premises, and provided that an additional rent of 3*l.* per ton should be payable by way of penalty for every ton of hay or straw so sold, and it appeared that there was a substantial difference between the manurial value of hay and that of straw:—*Held*, that the sum so made payable was a penalty and not liquidated damages. WILLSON *v.* LOVE - C. A. 626

LEVEL CROSSING—Gatekeeper's duty—Contributory negligence - 178, 189, n.
See RAILWAY. 1, 2.

LICENSING ACTS—*Offences—Sale at Place not authorized by Licence—Sale—Appropriation of Goods Sold—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 3.] A brewer at Burnley, having an off-licence for the sale of beer by retail, sent round a traveller to obtain orders at Accrington. The traveller handed to the customer at whose house

LICENSING ACTS—*continued.*

he called a printed and stamped post-card, addressed to the brewery; the traveller wrote on the post-card the quantity of ale required, and the customer signed the post-card, which was then posted by the traveller. The post-card contained a request to the brewer to supply the quantity of ale named weekly until further notice, and concluded as follows: "I assent to the appropriation by you to this order at your brewery of goods of the above description and in a deliverable state." The brewer's carter selected at the brewery, in accordance with such an order, six bottles of ale, one of which he labelled with the customer's name and address, and placed them in a coop or box together with six other bottles for another customer, one of which was also labelled. The goods (with others) were then placed on a lorry, and ultimately delivered at the customer's house, where they were paid for on delivery:—*Held*, that there had been a complete sale and appropriation of the goods at the brewery at Burnley, and that the brewer could not be convicted under s. 3 of the Licensing Act, 1872, of selling intoxicating liquor at a place where he was not authorized by his licence to sell the same.—*Pletts* v. *Campbell* ([1895] 2 Q. B. 229) distinguished. PLETTS *v.* BEATTIE - 519

2. —— *Offences—Sale to Drunken Person—Sale by Servant contrary to Instructions—Licensing Act*, 1872 (35 & 36 *Vict. c.* 94), *s.* 13.] The Licensing Act, 1872, s. 13, makes it an offence for any licensed person to sell any intoxicating liquor to any drunken person. The respondent, a licensed person, gave orders to his servants that no drunken persons were to be served; during his absence one of his servants sold intoxicating liquor to a drunken person:—*Held*, that the respondent was guilty of an offence under the section for he was liable for the act of his servant, that act having been done by the servant within the general scope of his employment, although contrary to the orders of his master. COMMISSIONERS OF POLICE *v.* CARTMAN - - 655

LIEN—Solicitor's lien for costs—Taking out letters patent - - - 417
See BANKRUPTCY. 12.

LIGHT DUES—"Port charges"—Charterparty
See SHIP. 1. 20

LOCAL GOVERNMENT—*County Council—By-law—Reasonableness—Use of Profane or Obscene Language—Annoyance.*] A by-law made by a county council under s. 16 of the Local Government Act, 1888, was in the following terms: "No person shall in any street or public place, or on land adjacent thereto, sing or recite any profane or obscene song or ballad, or use any profane or obscene language":—*Held*, that the by-law was invalid, since even if the words "or on land adjacent thereto," which were clearly too wide, were struck out, it was still unreasonable, because it did not contain any words importing that the acts must be done so as to cause annoyance. STRICKLAND *v.* HAYES - - - 290

2. —— *Defective Water-closets — Notice requiring Owner to Amend—Validity of—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76), *s.* 39, *sub-s.* 3; *s.* 41, *sub-s.* 2.] By the Public Health (London) Act, 1891, s. 39, sub-s. 1, the county council are required to make by-laws with respect to water-closets; and by sub-s. 3 any directions given by the sanitary authority under that Act so far as they are not in accordance with such by-laws shall be void.—By s. 41, sub-s. 2, if on examination any water-closet "appears to be in bad order and condition or to require cleansing alteration or amendment," the sanitary authority shall serve a notice on the owner requiring him to put it in proper order or condition.—And by sub-s. 3, "Any person who thinks himself aggrieved by any notice . . . . of a sanitary authority under this section in relation to any water-closet . . . . may appeal to the county council whose decision shall be final."—The county council made by-laws under s. 39 with respect to future water-closets prescribing the mode of their construction, but made none with respect to structural alterations of existing water-closets.—The respondent was the owner of a water-closet which had been constructed before the making of the by-laws. The appellants as the sanitary authority, purporting to act under s. 41, sub-s. 2, served a notice on the respondent requiring him to make certain structural alterations in the water-closet:—*Held*, (1.) that upon a summons for non-compliance with the notice the magistrate had jurisdiction to inquire into the validity of the notice notwithstanding the provisions as to an appeal to the county council.—(2.) That the notice was void under s. 39, sub-s. 3, there being no by-laws for it to be in accordance with:—*Held*, also, by Kennedy J., that the "alteration or amendment" which the sanitary authority are empowered to require under s. 41, sub-s. 2, does not comprise structural alteration. VESTRY OF FULHAM *v.* SOLOMON - - 198

3. —— *Highway—Removal of Obstructions—Local Authority — Powers — Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 149—*Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 26.] An urban district council has power to remove encroachments upon any highway vested in it by s. 149 of the Public Health Act, 1875, without first taking proceedings, summarily or by indictment, against the person alleged to have encroached. REYNOLDS *v.* URBAN DISTRICT COUNCIL OF PRESTEIGN - - - - 604

4. —— *Parochial Elector—Ownership—Qualification—Woman—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *ss.* 2, 43, 44.] A woman, whether married or single, is not qualified by reason of ownership of property to be a parochial elector. DRAX *v.* FFOOKS - - C. A. 238

5. —— *Parochial Elector—Parish in Parliamentary Borough—Freemen—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 2, *sub-s.* 1; *s.* 75, *sub-s.* 2.] The fact of a person being on the list of freemen for a parliamentary borough does not entitle him to have his name entered in the parochial electors' list for a parish within the borough, even though he may reside within the parish; the list of freemen not being a "portion of the parliamentary register of electors relating to the parish" within the meaning of s. 2, sub-s. 1, of the Local Government Act, 1894. HART *v.* BEARD - - - - - 54

LOCAL GOVERNMENT—*continued.*

6. —— *Weights and Measures Act*, 1889 (52 & 53 *Vict. c.* 21), *s.* 28—*By-law—Validity—Sale of Coal from Vehicle—Requisition to Weigh.*] By a by-law made by a local authority under s. 28 of the Weights and Measures Act, 1889, which enables local authorities to make by-laws regulating the sale of coal in small quantities, "Every person in charge of any vehicle carrying coal for sale . . . . in quantities not exceeding two hundredweight . . . . shall re-weigh the coal upon being requested to do so by any purchaser, or by any one on behalf of the purchaser, or by an inspector of weights and measures, or by any constable":—*Held*, by Lord Russell of Killowen C.J. (Wright J. doubting), that the section authorized the making of a by-law requiring the coal to be weighed by the person in charge of the vehicle, but *held* by the Court that the by-law was unreasonable, and therefore bad. ALTY *v.* FARRELL - - - - 636

—— Highway—Main road—Footways, repair of in urban districts - - - 24
See HIGHWAY.

LONDON—Metropolis—London Building Act. 1894—Exemptions—Contract entered into before passing of Act - - 60
See METROPOLIS.

MACHINERY—Cleaning—Employment of children - - - - - 244
See FACTORY ACTS.

MARGARINE—*Sale contrary to Act—Delivery to Purchaser in Borough—Jurisdiction of County Justices—Time for Service of Summons—Notification to Seller—Condition Precedent—Margarine Act*, 1887 (50 & 51 *Vict. c.* 29), *ss.* 6, 7, 12—*Sale of Food and Drugs Acts*, 1875, 1879 (38 & 39 *Vict. c.* 63), *ss.* 6, 12, 14, 20, 21, 28 (42 & 43 *Vict. c.* 30), *s.* 10—*Poor Law Amendment Act*, 1867 (30 & 31 *Vict. c.* 106), *s.* 27—*Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 154.] The appellant was convicted, on the complaint of the guardians of a union, by county justices, under the Margarine Act, 1887, for selling margarine otherwise than in a package marked "Margarine," contrary to s. 6. The margarine was delivered to the purchaser in a borough which had not a separate court of quarter sessions.—*Held*, affirming the conviction—That the county justices had jurisdiction:—That, the justices having found that the article sold was not a perishable article, s. 10 of the Sale of Food and Drugs Act Amendment Act, 1879, did not apply, and it was not necessary that the summons should be served within twenty-eight days from the time of the purchase;—That, the margarine not having been purchased for test purposes, or with the intention of submitting it to analysis, it was not a condition precedent to the prosecution under the Margarine Act that the notification of intention to have it analysed, prescribed by s. 14 of the Sale of Food and Drugs Act, 1875, should have been given to the appellant. —*Parsons* v. *Birmingham Dairy Co.* (9 Q. B. D. 172) disapproved.—*Guardians of Enniskillen* v. *Hilliard* (14 L. R. Ir. 214) approved. BUCKLER *v.* WILSON - - - - - 83

MARRIED WOMAN—Parochial elector—Ownership—Qualification - - 238
See LOCAL GOVERNMENT. 4.

METROPOLIS — *London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *s.* 212—*Exemptions—Contract entered into before passing of Act.*] The exemption from the operation of the London Building Act, 1894, contained in s. 212 of that Act in favour of buildings to be carried out under a contract entered into before the passing of the Act applies not merely to buildings to be erected under a contract with a builder according to definite plans and specifications, but also to buildings to be erected under a building agreement for the development of a building estate, the complete performance of which may extend over a period of years. TANNER *v.* OLDMAN 60

METROPOLIS—MANAGEMENT ACTS—"*Drain*" —"*Sewer*"—*Combined Drainage—Metropolis Local Management Act*, 1855 (18 & 19 *Vict. c.* 102), *ss.* 68, 250.] A pipe carrying the sewage of two houses in a metropolitan parish into the main sewer was vested in and repairable by the vestry under the Metropolis Local Management Act, 1855, being a "sewer" within the definition of that word in s. 250. Subsequently the owner of one of the houses disconnected his sewage, so that thereafter the pipe was "used for the drainage of one building only" within the definition of "drain" in the same section:—*Held*, that the pipe did not, upon such disconnection taking place, become a drain repairable by the owner of the house still served by it, but remained a sewer vested in and repairable by the vestry. VESTRY OF ST. LEONARD, SHOREDITCH *v.* PHELAN - 533

2. —— *General Line of Buildings—Site of Old Building—Land occupied with House—New Street—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 74, 75.] A new street was formed in the metropolis, opening at a right angle into an existing street in which there was a continuous row of houses with forecourts in front and gardens behind. The plan for the new street submitted to the London County Council contained a note stating that two of the above-mentioned houses were (among others) to be pulled down, and the new street, as shewn by the plan, occupied the whole site of one of them with the forecourt and garden belonging thereto, and part of the site of the other and of the forecourt and garden belonging thereto, which were respectively forty-eight and ninety feet in depth. These houses having been pulled down, the owner of the last-mentioned of them was erecting on so much of its site and the forecourt and garden on each side of it as was not thrown into the new street a block of buildings fronting to the new street, which projected beyond the general line of buildings in that street as fixed by the superintending architect of the county council:—*Held*, that he was not building on the site of a previously existing building within the meaning of s. 74 of the Metropolis Management Amendment Act, 1862, and therefore was infringing the provisions of s. 75 of that Act, which forbids the erection of buildings beyond the general line of buildings in the street.—*Lord Auckland* v. *Westminster District Board of Works*

METROPOLIS—MANAGEMENT ACTS—*contd.*
(L. R. 7 Ch. 597) distinguished. LONDON COUNTY COUNCIL *v.* PRYOR - - - **C. A. 465**
—— Water supply — Default by company — Penalties - - - - **446**
See WATERWORKS.
MISCONDUCT—Affidavit disclosing no primâ facie case - - - - **327**
See SOLICITOR.
—— Umpire—Bias - - - - **649**
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MISREPRESENTATION—Prospectus - **372**
See COMPANY. 2.
MISTAKE—Money paid—Bonâ fide holder of bill of exchange — Right to recover money - - - - - **7**
See BILL OF EXCHANGE. 1.
MONEY HAD AND RECEIVED — Mistake — Money paid to bonâ fide holder of bill of exchange - - - - **7**
See BILL OF EXCHANGE. 1.
MORTGAGE—Foreclosure—Conveyance on sale —Stamp - - - - **422**
See REVENUE. 6.
MUNICIPAL CORPORATION—*By-law—Validity —Using Streets for Betting—Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 23.] Sect. 23 of the Municipal Corporations Act, 1882, empowers the council of a borough to make by-laws "for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable by virtue of any Act in force throughout the borough."—A by-law made under this section prohibited, under a penalty, any person from frequenting and using any street or other public place within the borough for the purpose of bookmaking or betting:—*Held*, that the by-law was one which could properly be made for the good rule and government of the borough, and was, therefore, valid. BURNETT *v.* BERRY - - - - - - - **641**

NEGLIGENCE — Level crossing — Gatekeeper's duty - - - - **178, 189, n.**
See RAILWAY. 1, 2.
—— Liability of principal for negligence of contractor - - - - **335**
See PRINCIPAL AND AGENT.
—— Solicitor — Communication of progress of action to one partner only - **386**
See PARTNERSHIP.
NEWSPAPER—Publication tending to influence result of proceedings - - **577**
See CONTEMPT OF COURT.
NOTICE — Order and disposition — Protected transaction - - - - **412**
See BANKRUPTCY. 6.

OFFICER—Appointment—Conditions as to expenditure - - - - **158**
See SEA FISHERIES.
—— Army and navy—Tenure of office—Liability to dismissal — Engagement made with officer by Crown—Petition of right **[121, n.**
See CROWN, PREROGATIVE OF. 2.

OFFICER—*continued.*
—— Civil service—Tenure of office—Liability to dismissal — Engagement made with officer by Crown—Petition of right **116**
See CROWN, PREROGATIVE OF. 1.
OFFICIAL RECEIVER—Bankruptcy—Costs of solicitor to trustee—Right of official receiver to attend taxation - **13**
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ORDER AND DISPOSITION—Notice—Protected transaction - - - - **412**
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PARISH—Elector—Married woman—Qualification - - - - - **238**
See LOCAL GOVERNMENT. 4.
—— Parochial elector—Freemen - - **54**
See LOCAL GOVERNMENT. 5.
PARLIAMENT — "*Dwelling-house*" — *Service Franchise*—"*Part of House separately occupied as a Dwelling*"—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 5—*Representation of the People Act*, 1884 (48 & 49 *Vict. c.* 3), *s.* 3.] The appellant had, by virtue of his service as a policeman, the exclusive occupation of a cubicle in a dormitory at a police station. The cubicle was separated from the rest of the dormitory, which contained a number of similar cubicles, by wooden partitions which did not reach the ceiling. The atmosphere of the dormitory was common to all the cubicles, and a gas-light was shared by them in common. A lavatory and mess-room were provided for the policemen who occupied these cubicles in another part of the police station. The policemen occupying the cubicles were subject to the control of a superior officer, who had power to impose restrictions upon their use of the cubicles inconsistent with the rights which a person ordinarily exercises in respect of his own dwelling:—*Held* (by Lord Esher M.R. and Lopes L.J., Rigby L.J. dissenting), that the cubicle was not part of a house separately occupied as a dwelling within the meaning of the Parliamentary and Municipal Registration Act, 1878, s. 5, and that the appellant was therefore not entitled to the franchise in respect of it under the Representation of the People Act, 1884, s. 3. CLUTTERBUCK *v.* TAYLOR **[C. A. 395**

2. —— *Election Petition — Particulars — Offences subsequent to Date of Petition.*] An election petition, after alleging that the respondent had been guilty of bribery, treating and undue influence, further charged him with the commission of "other corrupt and illegal practices before, during and after the election":—*Held*, that it was not competent to the petitioner to include in his particulars, or to give evidence of, offences alleged to have been committed after the date of the petition, the petition not having been amended within the time limited for amendment. CREMER *v.* LOWLES (HAGGERSTON ELECTION PETITION) - - - - - **C. A. 504**

3. —— *Franchise — Registration — Revising Barrister closing List*—6 & 7 *Vict. c.* 18, *s.* 41—28 & 29 *Vict.* c. 36, *s.* 15.] A notice of the revision of the lists of parliamentary and municipal

PARLIAMENT—*continued.*
electors of a borough stated that the lists for a certain parliamentary division of the borough would be closed at a certain sitting of the revision court. At the termination of that sitting the revising barrister, having ascertained that there were no other claimants or persons objected to present who desired to be heard, declared the list closed. On the following day he proceeded in open court to read out and to initial the names expunged or inserted by him in the list. Certain claimants, on their names being thus read out, applied then for the first time to be heard in support of their claims. The revising barrister declined to hear them on the ground that they were then too late, and expunged their names from the list:—*Held*, that the claimants had, under the circumstances, no right to be heard. THE QUEEN *v.* SODEN - - - 499

4. —— *Franchise — Registration — Revising Barrister closing List*—6 *&* 7 *Vict. c.* 18, *s.* 41; 28 *&* 29 *Vict. c.* 36, *s.* 15.] A notice of the revision of the lists of parliamentary and municipal electors for a borough stated that the lists for a certain parliamentary division of the borough would be closed at a certain sitting of the revision court. At the termination of that sitting the revising barrister, having ascertained that there were no other claimants or persons objected to present who desired to be heard, declared the list closed. On the following day he proceeded in open court to read out and to initial the names which he expunged from or inserted in the list. Certain claimants, on their names being thus read out, applied for the first time to be heard in support of their claims. The revising barrister declined to hear them on the ground that they were then too late, and expunged their names from the list:—*Held*, affirming the judgment of the Queen's Bench Division, that the claimants had under the circumstances no right to be heard. THE QUEEN *v.* SODEN - - C. A. 634

5. —— *Registration of Voters—Description—Qualification—Amendment — Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28—*Registration Order*, 1895, *Sched. II., Part I., s.* 19 *i.* (*b*).] A person who claimed to have his name entered in the list of occupiers of a parliamentary borough inserted in his claim under the head of "Nature of Qualification" the word "dwelling-house," and under that of "Description of Qualifying Property" the words "69 Richmond Road, 3 Hamilton Square." The revising barrister amended the statement of the nature of qualification by inserting the word "successive" after the word "dwelling-house":—*Held*, that, as on a reasonable construction of the claim the qualification stated must be taken to refer to successive occupation, the revising barrister had power to make the amendment. SOUTTER *v.* RODERICK - - - 91

PARTNERSHIP—*Authority of Acting Partner—Defence of Action against Firm—Employment of Solicitor — Entering Appearance in Names of Partners—Communication of Progress of Action to other Partners — Negligence — Order* XLVIII. *A, r.* 5.] A managing partner of a business firm has an implied authority to employ a solicitor to defend an action brought against the firm for the price of goods supplied to the firm in the ordinary course of business.—A solicitor employed by the managing partner of a business firm to defend an action brought against the firm in the firm name has authority to enter an appearance in the names of each of the parties individually, and is not guilty of negligence in not keeping the partners, other than the managing partner by whom he was employed, informed of the progress of the action. TOMLINSON *v.* BROADSMITH - C. A. 386

PENALTIES — Who may take proceedings — Metropolis Water Act - - 446
See WATERWORKS.

PENALTY—Covenant not to carry away hay and straw - - - - 626
See LANDLORD AND TENANT. 2.

PETITION OF RIGHT—Army and navy—Officer —Tenure of office—Liability to dismissal —Engagement made with officer by the Crown - - - 121, n.
See CROWN, PREROGATIVE OF. 2.

—— Civil Service—Officer—Tenure of office—Liability to dismissal — Engagement made with officer by Crown - 116
See CROWN, PREROGATIVE OF. 1.

PLEADING—Document—Action for recovery of land - - - - - 554
See PRACTICE. 4.

POOR-RATE—*Valuation List—Appeal—Clerk of Assessment Committee—Right of Audience—Valuation (Metropolis) Act*, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 62.] The provision in s. 62 of the Valuation (Metropolis) Act, 1869, that on an appeal against a valuation list "an assessment committee . . . . may appear . . . . by their clerk" does not give the clerk a right to be heard on their behalf for the purpose of consenting to an alteration in the list. THE QUEEN *v.* JUSTICES OF LONDON [C. A. 659

PRACTICE—*Commercial Cause—Application to enter Cause in Commercial List before Appearance of Defendant—Power to order Costs to be Costs in the Cause.*] An application by a plaintiff to the judge charged with commercial business for leave to enter the cause in the separate list of commercial causes may be made before the appearance of the defendant, and before the time for such appearance has expired, and the judge has power to direct that the costs of the application shall be costs in the cause. BARRY *v.* PERUVIAN CORPORATION - - - - - C. A. 208

2. —— *Costs — Solicitor — Reversal of Judgment—Repayment of Costs.*] A solicitor who has demanded and received payment of costs payable to his client under an order of the Court, with knowledge that an appeal against that order was pending, cannot on its reversal be ordered personally to repay the costs so paid to him in the absence of any misconduct or undertaking to do so on his part. HOOD BARRS *v.* HERIOT C. A. 610

3. —— *Order for Payment of Costs, Action upon—Solicitor—Application to strike off Rolls—Attachment—Order* XLII., *r.* 24.] An action will lie upon an order of the Court by which a solicitor is ordered to pay the costs of an application to

PRACTICE—*continued.*
strike him off the rolls, notwithstanding the fact that an unsuccessful application to attach him for disobedience to the order has been made by the person to whom he was ordered to pay the costs. GODFREY *v.* GEORGE - - - C. A. 48

4. —— *Pleading—Documents — Statement of Effect—Action for Recovery of Land—Order* XIX., *r.* 21.] The plaintiffs in an action for the recovery of land having in their statement of claim briefly stated the effect of certain limitations in a will, as alleged by them, without setting out the precise words of the will:—*Held*, that they were entitled so to do under Order XIX., r. 21, although a question arose as to the construction of the will. DARBYSHIRE *v.* LEIGH - C. A. 554

5. —— *Service of Writ out of Jurisdiction—Defendant domiciled or ordinarily resident in Scotland—Agreement that Writ may be served out of Jurisdiction—Order* XI., *r.* 1 (*e*).] An agreement by a person domiciled or ordinarily resident in Scotland that a writ for breach of contract arising within the jurisdiction may be served on him in Scotland does not authorize the Court to direct service of such a writ in Scotland, as to do so would be in direct contravention of Order XI., r. 1 (*e*). BRITISH WAGON COMPANY *v.* GRAY [C. A. 35

6. —— *Trial without Jury — Rehearing in Court of Appeal—Decision of Judge on Facts—Weight to be given to Decision.*] Where a case tried by a judge without a jury comes before the Court of Appeal, that Court will presume that the decision of the judge on the facts was right, and will not disturb it unless the appellant satisfactorily makes out that it was wrong (*per* Lord Esher M.R. and Lopes L.J.). *Per* Kay L.J.: Under Order LVIII. the Court of Appeal is bound to try the case and give the judgment which ought to have been given, though in a doubtful case the judgment of the Court below on the facts is entitled to great weight. COLONIAL SECURITIES TRUST COMPANY *v.* MASSEY - - C. A. 38

7. —— *Writ—Address of Defendant—Order* II., *r.* 3.] The defendant applied to set aside a writ of summons, which had been issued and served upon him in England, on the ground that by the writ the defendant was incorrectly described as of Lytham in the county of Lancaster, whereas his only place of business and address was at Londonderry in Ireland:—*Held*, refusing the application, that the incorrect statement of the defendant's address did not vitiate the writ, and it was good. SMITH *v.* HAMMOND - - 571

—— Divorce Court.
See Cases under DIVORCE.

—— Set-off—Costs—Two appeals - - 219
See BANKRUPTCY. 4.

PRINCIPAL AND AGENT — *Contractor—Liability of Principal for Negligence of Contractor—Public Body—Breach of Duty—Damage—Remoteness—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *s.* 150.] A district council, being about to construct a sewer under their statutory powers, employed a contractor to construct it for them. In consequence of his negligence in carrying out the work a gas-main was broken, and the gas escaped from it into the house in which the plaintiffs (a husband and wife) resided, and an explosion took place, by which the wife was injured, and the husband's furniture was damaged. In an action by the plaintiffs against the district council and the contractor:—*Held*, that the district council owed a duty to the public (including the plaintiffs) so to construct the sewer as not to injure the gas-main; that they had been guilty of a breach of this duty; that, notwithstanding that they had delegated the performance of the duty to the contractor, they were responsible to the plaintiffs for the breach; and that the damages were not too remote to be recovered.—Decision of Wright J. reversed. HARDAKER *v.* IDLE DISTRICT COUNCIL - - - - - C. A. 335

—— Liability for goods ordered by receiver 669
See COMPANY. 1.

PRINCIPAL AND SURETY—*Co-Sureties—Contribution—Material Alteration of Instrument — Discharge.*] Where two or more persons join as sureties for a common principal, but bind themselves in different amounts, in the event of the principal being in default they are liable to contribute to the satisfaction of the creditor's claim in proportion to the limits of their respective liabilities, and not in equal amounts.—Four persons, as sureties for a principal, executed a joint and several bond of suretyship, by the terms of which the liability of two of them was limited to 50*l.* each, and that of the other two to 25*l.* each. One of those whose liability was limited to 50*l.*, after the other three had executed the bond, executed it himself, but added to his signature the words "25*l.* only." The obligee accepted the bond so executed without objection, and subsequently the principal became in default:—*Held*, that the effect of the added words was to make a material alteration in the bond, so that the three first signatories were thereby discharged from their obligation; and that as the last signatory only executed the bond as a joint and several bond, he also was not bound by it. ELLESMERE BREWERY COMPANY *v.* COOPER - 75

PROBATE DUTY—Foreign company—Certificates transferable in this country by delivery - - - - 211
See REVENUE. 9.

—— Foreign mortgage - - - 354
See REVENUE. 8.

PROHIBITION—Arrears of rent-charge—Jurisdiction - - - - 645
See COUNTY COURT. 3.

PROMISSORY NOTE—Document containing unnecessary provisions - - 582
See BILL OF EXCHANGE. 2.

PROSPECTUS—Misrepresentation - - 372
See COMPANY. 2.

PROTECTED TRANSACTION - 406, 412
See BANKRUPTCY. 3, 6.

RAILWAY —*Negligence—Level Crossing—Contributory Negligence—Onus of Proof with regard to Contributory Negligence.*] A railway line crossed a public footpath on the level, the approaches to the crossing being guarded by hand gates. A

RAILWAY—*continued.*
watchman who was employed by the railway company to take charge of the gates and crossing during the day was withdrawn at night.—The dead body of a man was found on the line near the level crossing at night, the man having been killed by a train which carried the usual head lights but did not whistle or otherwise give warning of its approach. No evidence was given of the circumstances under which the deceased got on to the line.—An action on the ground of negligence having been brought by the administratrix of the deceased, the jury found a verdict for the plaintiff:—*Held*, (12 App. Cas. 41) affirming the decision of the Court of Appeal, that even assuming (but without deciding) that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident; that there was therefore no case to go to the jury and that the railway company were not liable.—Observations as to the onus of proof with regard to contributory negligence. WAKELIN *v.* LONDON AND SOUTH WESTERN RAILWAY COMPANY - - 189, n.

2. —— *Negligence — Level Crossing — Gatekeeper's Duty — Contributory Negligence.*] The plaintiff's husband was run over and killed by a train of the defendants under the following circumstances. The defendants' line crossed a public highway on the level. There was a gatekeeper's lodge near the crossing, where a servant of the defendants was stationed, whose duty under the company's regulations was to attend to the carriage gates at the crossing, and, whenever a train was approaching, to stand by the rails and, if the line was clear, exhibit as a signal a white flag by day or a white light by night. There were lamps on the carriage gates which shewed, when they were closed across the highway, a white light, and, when they were closed across the line, a red light. The deceased, who lived near the crossing on the other side of the line, called at the gatekeeper's lodge between 8 and 9 o'clock on a December night to inquire whether his wife was there, and found the gatekeeper sitting in his lodge reading. Being told that his wife was not there, he left the lodge. Though a train had been signalled, the gatekeeper gave him no warning and did not go out to signal the train. The deceased attempted to cross at the level crossing, and was caught by the train and killed. The train carried lights which were visible by any one about to cross at the level crossing for a distance of more than 600 yards. The engine-driver whistled ten seconds before the train passed over the crossing, which it did at the rate of from thirty-five to forty miles an hour. The engine-driver stated in evidence that, when approaching the crossing, he saw the white light on the carriage gates, but did not receive any hand-signal from the gate-keeper:—*Held*, in an action by the plaintiff under Lord Campbell's Act to recover damages in respect of her husband's death, that there was upon the above facts evidence to go to the jury of negligence on the part of the defendants by which, and not by any negligence on his own part, the death of the plaintiff's husband was caused, and therefore the judge at the trial was right in not withdrawing the case from the jury. SMITH *v.* SOUTH EASTERN RAILWAY COMPANY C. A. 178

3. —— *Regulation—Increase of Rates—Standard of Reasonableness — Railway and Canal Traffic Act*, 1894 (57 & 58 *Vict. c.* 54), *s.* 1, *sub-s.* 1.] By the Railway and Canal Traffic Act, 1894, s. 1, sub-s. 1, "Where a railway company have, ... since the last day of December, 1892, directly or indirectly increased . . . . any rate or charge, then if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to shew that the rate or charge is within any limit fixed by an Act of Parliament or by any Provisional Order confirmed by Act of Parliament."—In a case where rates for the carriage of coal had been indirectly increased on January 1, 1893:—*Held*, by Collins J., that the effect of the Act was not necessarily in all cases to declare the increased rates void, but that all future increases of rates must be tried by the standard of reasonableness, depending on circumstances existing or apprehended before the increase was made, and therefore, in the case then before the Court, before the Act came into operation. RICKETT, SMITH & CO. *v.* MIDLAND RAILWAY COMPANY. DERBYSHIRE SILKSTONE COAL COMPANY *v.* THE SAME. GRASSMOOR COMPANY *v.* THE SAME - - 260

4. —— *Regulation—Railway Commissioners—Jurisdiction—Cartage Charges—Increase of Rate—Complaint of Unreasonableness—Railway Rates Confirmation Acts*, 1891, 1892 — *Railway and Canal Traffic Act*, 1894 (57 & 58 *Vict. c.* 54), *s.* 1, *sub-s.* 1.] Where a railway company have, since the last day of December, 1892, increased a rate or charge for cartage, and complaint is made that the rate or charge is unreasonable, exclusive jurisdiction is not vested in an arbitrator appointed by the Board of Trade under the Railway Rates Confirmation Acts, 1891, 1892, but the Railway Commissioners have jurisdiction to hear and determine the complaint. MANSION HOUSE ASSOCIATION ON RAILWAY TRAFFIC *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - 273

RATES—Increase of—Standard of reasonableness - - - - 260, 273
See RAILWAY. 3, 4.

RECEIVER—Liability for goods ordered by—Principal and agent - - 669
See COMPANY. 1.

RECEIVING ORDER—Absence of assets 473
See BANKRUPTCY. 8.

RECOVERY OF LAND—Action for—Document—Pleading - - - - 554
See PRACTICE. 4.

REGISTRATION — Parliamentary voter — Description—Qualification—Amendment 91
See PARLIAMENT. 5.

REMITTED ACTION—County court—Practice
See COUNTY COURT. 2, 4. 163, 246

RENT-CHARGE—Arrears of—Action by trustees of charity—Prohibition - - 645
See COUNTY COURT. 3.

RESTRAINT OF TRADE — *Agreement, whether Severable — Validity — Reasonableness.*] By an agreement for the employment of the defendant by the plaintiffs in their business of dairymen, the defendant agreed that he would not, during the continuance of his service, or at any time thereafter, serve or solicit, or in any way interfere with, any of the customers who should at any time be served by or then belonging to the plaintiffs in the said business.—*Held*, that the defendant's agreement must be construed as referring only to the business of dairymen as then carried on by the plaintiffs in a particular locality, and not to any other such business started by them elsewhere; and, by Lord Esher M.R. and Lopes L.J., that the agreement was severable and was good with regard to customers of the plaintiffs who were such while the defendant was in their service:—By Rigby L J., and *semble*, by Lord Esher M.R., the agreement was good, both with regard to the above-mentioned customers and with regard to customers who became such after the termination of the defendant's service with the plaintiffs. DUBOWSKI & SONS *v.* GOLDSTEIN [C. A. 478

REVENUE—*Dog Licence—Certificate of Exemption—Duty of Justices—Offence not of Trifling Nature—Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 22—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 16.] The respondent, the owner of a dog, having applied to the Commissioners of Inland Revenue for a certificate of exemption and been refused, declined to take out a licence, and was summoned before justices. The justices held that the commissioners ought to have granted a certificate of exemption, and that if the respondent had committed an offence it was in their opinion of so trifling a nature that they would exercise the powers given to them by s. 16 of the Summary Jurisdiction Act, 1879, and dismiss the information:—*Held*, that the justices had no jurisdiction to review the decision of the commissioners as to granting or withholding a certificate of exemption, and that the offence of refusing to take out a dog licence was not an offence of a trifling nature to which s. 16 of the Summary Jurisdiction Act, 1879, would apply. PHILLIPS *v.* EVANS [305

2. —— *House Duty—School Buildings—Head and Assistant Masters' Houses — Occupier* — 48 *Geo.* 3, *c.* 55, *Sched. B*—14 & 15 *Vict. c.* 36.] The governing body of a public school was assessed to inhabited house duty, as occupier, in respect of the houses of the head master and assistant masters, and the chapel and other school buildings, which were built for the use of the school, and were used by all the boys at the school, whether borders in the masters' houses or not. The head master paid no rent, but was bound by the terms of his appointment to reside in his house, and took in boarders. The assistant masters paid rents less than the full annual value of their houses, and took in boarders, and resided in their houses as house masters.—On a case stated under the Taxes Management Act, 1880:—*Held*, that the head and assistant masters did not occupy their houses as servants or agents of the governing body, so as to make their occupation the occupation of the governing body, but were themselves the occupiers of their respective houses, and that the other school buildings were not inhabited dwelling-houses, and therefore the assessment was wrong. GOVERNING BODY OF CHARTERHOUSE SCHOOL *v.* GAYLER (SURVEYOR OF TAXES) - - - - - - 437

3. —— *House Duty—School Buildings—Head Master's House — Occupier* — 48 *Geo.* 3, *c.* 55, *Sched. B*—14 & 15 *Vict. c.* 36.] A company owning a public school, founded by charter, was assessed to inhabited house duty in respect of land and school buildings, and a head master's house, garden, and stables, after allowing for the value of ten out of eleven acres, which were occupied as a garden and playground. The premises were used for the purposes of the school. The head master's house was held by him under a lease, which would determine if he ceased to hold his office. He resided in the house and kept boarders there for profit, but was not bound to reside in it. On a case stated under the Taxes Management Act, 1880:—*Held*, that the head master, and not the company, was the occupier of the head master's house, and that the rest of the school buildings could not be treated as inhabited dwelling-houses, and therefore the assessment was wrong. CLIFTON COLLEGE *v.* TOMPSON (SURVEYOR OF TAXES) - - 432

4. —— *Income Tax—Assessment of Profits or Gains—Payment made to Retiring Manager of Company—Income Tax Act*, 1842 (5 & 6 *Vict. c.* 35), *s.* 100, *Sched. D, Cases* 1 *and* 2, *r.* 1.] The respondents, an insurance company, on taking over the business of another insurance company, agreed to take the manager of that company into their service at a specified salary, with liberty to commute the same by payment of a gross sum, to be ascertained in a manner agreed on. The respondents subsequently dismissed the manager, and paid him a sum of money ascertained in accordance with the agreement. In making up their return of profits for assessment to income tax for the year in which the payment was made, the respondents deducted the sum so paid. On a case stated by Commissioners of Income Tax:—*Held*, that the money so paid was not money expended for the purposes of the respondents' adventure within the meaning of the first rule applicable to the first two cases of Sched. D of s. 100 of the Income Tax Act, 1842, and could not be deducted. WATSON *v.* ROYAL INSURANCE COMPANY - - - - - C. A. 41

5. —— *Inhabited House Duty—House "let in different Tenements"—The Customs and Inland Revenue Act*, 1878 (41 & 42 *Vict. c.* 15), *s.* 13.] By s. 13 of the Customs and Inland Revenue Act, 1878, where any house, being one property, "shall be divided into, and let in, different tenements," and any of such tenements are occupied solely for the purposes of any trade or business, or are unoccupied, the person chargeable as occupier of the house shall be entitled to exemption from inhabited house duty in respect of any tenements so occupied for purposes of trade or business, or unoccupied.—The respondents, being lessees of a house, divided it into two tenements, one of which they occupied solely for the purposes of

REVENUE—*continued.*
their trade, and the other they sublet to a person who used it as his residence. Having been assessed to inhabited house duty for the whole house, they claimed exemption in respect of the tenement occupied by themselves:—*Held*, that s. 13 did not apply to exempt them:—By Wright and Kennedy JJ., because the enactment required that the tenement in respect of which exemption was claimed should be let as a different tenement, and the tenement occupied by the respondents was not so let:—Also, by Kennedy J., because the enactment only applied where the whole house was let in different tenements, and did not apply where a landlord let part of it in different tenements and retained the other part himself. HODDINOT *v.* HOME AND COLONIAL STORES 169

6. —— *Stamp—Conveyance on Sale—Equitable Mortgage—Foreclosure—Conveyance by Mortgagor under Foreclosure Order—Ad Valorem Duty—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *ss.* 54, 57.] Where an equitable mortgagee obtains an order absolute for foreclosure under which the mortgagor is directed to execute, and does execute, a conveyance of all his estate and interest in the property to the mortgagee, the conveyance is a "conveyance on sale" within the meaning of s. 54 of the Stamp Act, 1891, and is chargeable with ad valorem duty under the head "Conveyance or transfer on sale" in the first schedule to that Act. HUNTINGTON *v.* COMMISSIONERS OF INLAND REVENUE - - - - 422

7. —— *Stamp—Bill of Exchange—Order on Banker to transfer in Account—Exemption—Bill drawn for the sole purpose of remitting Money to be placed to any Account of Public Revenue—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 32, *First Schedule, tit.* "*Bill of Exchange*," *Exemption* 10.] A firm of bankers in London having an account at the Bank of England, for the purpose of enabling a customer to pay customs duties on goods otherwise than in cash, issued a document addressed to the cashiers of the Bank of England, and directing them to transfer from the account of the bankers to the account of the Commissioners of Customs a sum named therein. This document was dealt with in one of two ways: (1) it was handed by the bankers to their customer in exchange for his cheque for the same amount, and given by him to the Commissioners of Customs, who handed it to the Bank of England, or (2) it was handed direct by the bankers to a Customs officer in exchange for their customers' cheque and subsequently handed by the Commissioners of Customs to the Bank of England. *Held* (affirming the decision of Wright and Kennedy JJ.), that the document was a bill of exchange payable on demand within the meaning of s. 32 of the Stamp Act, 1891, and that it was not exempt from duty as being a "bill drawn in the United Kingdom for the sole purpose of remitting money to be placed to any account of public revenue" within the meaning of the 10th exemption under the head "Bill of Exchange" in the First Schedule to the Act.—Sect. 32 is not to be construed as if the first part contained a definition of bills of exchange other than those payable on demand, and the second a definition of bills of exchange payable on demand; but the

REVENUE—*continued.*
first part applies to bills of exchange generally, and any document mentioned in it must, if payable on demand, be treated as coming within the second part.—The primary object of the documents in question was to enable the merchant to obtain the release of his goods from the custom house, and they were therefore not drawn "for the sole purpose" of remitting money to an account of public revenue, and, moreover, having regard to the history of the exemption clause, the word "remit" only applied to the placing to its proper account money which was already public money. COMMITTEE OF LONDON CLEARING BANKERS *v.* COMMISSIONERS OF INLAND REVENUE [C. A. 542

8. —— *Probate Duty—Foreign Mortgage—Local Situation of Asset.*] A testator died domiciled in England. By his will, after bequeathing various specific legacies, he devised and bequeathed one-fourth of the residue of his real and personal estate to his wife. His will was proved in England; and while his estate was being administered there, and before the amount of the clear residue had been ascertained, the wife died. The husband's estate included money invested on mortgages of real property in New Zealand. These mortgages remained unrealized at the date of the wife's death, and no part of them had been appropriated to any particular shares of the ultimate residue. The executors of the wife, in the affidavit made for the purpose of obtaining probate of her will, did not include her fourth share of the mortgage securities, and refused to do so, claiming that it was not liable to probate duty in this country:—*Held*, by Lopes and Kay L.JJ. (Lord Esher M.R. dissenting), reversing the judgment of the Queen's Bench Division, that the right of the executors of the wife not being to a share of the mortgage securities, but being a right as against the executors of the husband to have the estate administered, and to receive from them a fourth part of the residue, was an asset of the wife's estate, that its locality was English, and that its value was therefore subject to probate duty. ATTORNEY-GENERAL *v.* LORD SUDELEY [C. A. 354

9. —— *Probate Duty—Shares in Foreign Company—Certificates transferable in this Country by Delivery.*] Certificates of shares in a foreign company on which a form of transfer and power of attorney has been indorsed and executed in blank may be liable to probate duty, if they are marketable in this country and are operative by delivery.—*Attorney-General* v. *Bouwens* (4 M. & W. 171) followed. STERN *v.* THE QUEEN - 211

ROYALTIES—Personal earnings of undischarged bankrupt - - - - 417
See BANKRUPTCY. 12.

RULES—Order II., r. 3 - - - 571
See PRACTICE. 7.

—— Order XI., r. 1 (e) - - - 35
See PRACTICE. 5.

—— Order XIX., r. 21 - - - 554
See PRACTICE. 4.

—— Order XLII., r. 24 - - - 48
See PRACTICE. 3.

RULES—*continued.*
—— Order XLVIII. A, r. 5 - - - 386
See PARTNERSHIP.
—— Order LXV., rr. 14, 21 (sub-r. 27) - 219
See BANKRUPTCY. 4.

SCHOOL BUILDINGS—House duty 432, 437
See REVENUE. 2, 3.

SEA FISHERIES—*Fisheries Committee—Appointment of Officer—Conditions as to Expenditure—Power of one of several Councils to impose—Sea Fisheries Regulation Act*, 1888 (51 & 52 *Vict.* c. 54), *s.* 6.] By s. 6, sub-s. 1, of the Sea Fisheries Regulation Act, 1888, "Subject to any restrictions or conditions as to expenditure made by the council or councils by whom a local fisheries committee is appointed, the committee may appoint such fishery officers as they deem expedient" for the purposes therein specified:—*Held*, that the restrictions and conditions as to expenditure in connection with the appointment of a particular officer cannot be made after the officer has been appointed.—*Semble*, that where a local fisheries committee has been appointed by more county or borough councils than one, it is open to any one of such councils to make restrictions or conditions as to expenditure under the above section without the assent of the other councils. THE QUEEN *v.* MAYOR, &C., OF PLYMOUTH - 158

SEAGULL — "Domestic animal" — Cruelty to animals - - - - 166
See CRIMINAL LAW. 1.

SERVICE — Out of jurisdiction — Defendant domiciled or ordinarily resident in Scotland — Agreement that writ may be served out of jurisdiction - - 35
See PRACTICE. 5.
—— Summons—Putative father out of jurisdiction - - - - - 487
See BASTARDY. 2.

SET-OFF—Costs—Two appeals—Practice 219
See BANKRUPTCY. 4.

SEWER—Drain—Combined drainage - 533
See METROPOLIS—MANAGEMENT ACTS. 1.

SHARES.
See COMPANY.
—— Foreign company—Probate duty - 211
See REVENUE. 9.

SHIP—*Charterparty* — "*Port Charges*" — *Light Dues.*] In a charterparty providing for the payment of port charges, the expression "port charges" must be taken to mean all charges which a vessel has to pay before she gets her clearance from a port, and therefore to include whatever light dues she may be required to pay at such port. NEWMAN & DALE *v.* LAMPORT & HOLT - - - - - - 20

2. —— *Charterparty* — "*Safe Port*" — *Ship unable to reach Port without being Lightened—Evidence of Custom of Port.*] A ship was chartered to proceed with a cargo of grain to a port of call "for orders to discharge at a safe port . . . . Discharge to be given with dispatch, according to the customs of the port of discharge, and to be all at one port . . . . Charterers to have the privilege of naming the discharging dock . . . . the dock to be one into which the vessel can at once safely enter and lie afloat at all times." She was ordered to discharge at Gloucester. The basin at Gloucester is approached by a canal seventeen miles long. On arrival of the ship at Sharpness, which is at the entrance to the canal, she was found to be of too great a draught to proceed up the canal. The charterers requested the master to discharge a sufficient part of the cargo at Sharpness to allow of her navigating the canal, and to proceed to Gloucester with the remainder. The master refused to do so, and discharged the whole at Sharpness. Gloucester and Sharpness are for commercial purposes different ports. In an action by the charterers for breach of the charterparty:—*Held*, that the port of Gloucester, being one which the vessel could not safely reach with a full cargo, was not a safe port within the meaning of the charterparty; and that evidence of a custom of the port for vessels carrying grain to be lightened at Sharpness to allow of their proceeding up the canal to Gloucester was inadmissible, as being inconsistent with the terms of the charterparty by which the discharge was to be "at a safe port."—*Neilsen* v. *Wait* (16 Q. B. D. 67) distinguished. REYNOLDS & Co. *v.* TOMLINSON - - - - - 586

3. —— *Freight—Damage to Goods—Loss of Merchantable Character—Liability to pay Freight—Marine Insurance—Insurance of Profit—Warranty against Average—Concealment of Material Fact.*] A vessel, on board which dates had been shipped under bills of lading making the freight payable on right delivery, was sunk during the course of the voyage, and subsequently raised. On arrival at the port of discharge it was found that although the dates still retained the appearance of dates, and although they were of considerable value for the purpose of distillation into spirit, they were so impregnated with sewage and in such a condition of fermentation as to be no longer merchantable as dates:—*Held*, that freight was not payable in respect of them.—A ship having been chartered for a lump sum, the charterers put her up as a general ship, and goods were shipped on board under bills of lading at freights which in the aggregate exceeded the charter freight. The charterers insured their "profit on charter" by a policy which contained a warranty against average.—On arrival of the ship part of the cargo was delivered, and freight was payable under the bills of lading for that portion; but owing to sea damage the remainder of the cargo had lost its merchantable character, and freight was not payable in respect of it; the result being that the total amount of the freights payable under the bills of lading was less than the charter freight, and the charterers' profit was consequently lost:—*Held*, that there had been a total loss of the subject-matter of the insurance within the meaning of the warranty: *Held*, also, that the fact that the charter freight was a lump sum and not a tonnage rate, although material, had been sufficiently disclosed by a reference to the charterparty, a clause for payment of a lump sum for freight being a usual clause in charterparties, and the obligation to specifically disclose the contents of a charter extending only to unusual clauses, the insertion of which the

SHIP—*continued.*
underwriters could not reasonably have anticipated.—Decision of Mathew J. affirmed. ASFAR & Co. *v.* BLUNDELL - - - **C. A. 123**

4. —— *General Average—Adjustment—Constructive Total Loss.*] Where, a ship having sustained damage in a storm, it then became necessary, for the purpose of saving the ship and cargo, to make a general average sacrifice, the result of which was that the ship became a constructive total loss and was sold as such:—*Held*, that the proper mode of ascertaining the amount of the shipowners' loss by the general average sacrifice was by taking the difference between the value of the ship undamaged and the estimated cost of repairing the particular average damage and deducting therefrom the proceeds of the sale of the ship; and that no deduction of one-third new for old was to be made from the estimated cost of the repairs. HENDERSON BROTHERS *v.* SHANKLAND & Co. - - - **C. A. 525**

5. —— *Measurement of Tonnage—Deck Cargo—Horses and Cattle—Merchant Shipping Act*, 1876 (39 & 40 *Vict. c.* 80), *s.* 23.] Live animals, such as horses and cattle, are "goods" within the meaning of s. 23 of the Merchant Shipping Act, 1876, which provides that where goods are carried as deck cargo all dues payable on the ship's tonnage shall be payable as if there were added to the ship's registered tonnage the tonnage of the space occupied by such goods.—For the purposes of the computation of such tonnage, the measurement is to include only the space occupied by the animals themselves, fair allowance being made for their free bodily movements, and is not to include the shed or pens in which the animals are confined. RICHMOND HILL STEAMSHIP COMPANY *v.* CORPORATION OF TRINITY HOUSE **493**

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SHOP HOURS ACT, 1892—*Employment "in or about a Shop"—Work partly away from the Premises*—55 & 56 *Vict. c.* 62.] By the Shop Hours Act, 1892, s. 3, "No young person shall be employed in or about a shop for a longer period than seventy-four hours, including meal times, in any one week."—A newsagent, occupying a shop for the purposes of his business, employed a boy whose work was done partly inside the shop, and partly away from the shop in fetching newspapers and delivering them to the customers:—*Held*, that the whole employment was "in or about" the shop within the meaning of the Act. COLLMAN *v.* ROBERTS - - - - **457**

SOLICITOR—*Misconduct—Jurisdiction of Committee of Incorporated Law Society—Affidavit disclosing no Primâ Facie Case—Right of Committee to decline to take further Proceedings—Solicitors Act*, 1888 (51 & 52 *Vict. c.* 65), *ss.* 13 *and* 19.] Upon an application made under s. 13 of the Solicitors Act, 1888, to the Incorporated Law Society, requiring them to call upon a solicitor to answer allegations of misconduct made in the applicant's affidavit, the committee have a discretion not to proceed further in the matter of the application, if they come to the conclusion that

SOLICITOR—*continued.*
the affidavit discloses no case which the solicitor ought to be called upon to answer. THE QUEEN ON THE PROSECUTION OF CHAPMAN *v.* INCORPORATED LAW SOCIETY - - - - **C. A. 327**

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TRAMWAY—*By-law—Requirement to Deliver up Ticket or pay Fare—Reasonableness.*] By a by-law made by a tramway company and enforceable by a penalty, "Each passenger shall . . . . when required so to do either deliver up his ticket or pay the fare legally demandable for the distance travelled over by such passenger." A passenger having paid the fare and received a ticket, inadvertently lost it, and was thus unable to deliver it up when required. He declined to pay the fare over again, and was summoned by the company for breach of the by-law:—*Held*, that the by-law was not unreasonable, and that the passenger ought to have been convicted. HANKS *v.* BRIDGMAN - - - - - - 253

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2. —— *By-law—Requirement to shew Ticket—Reasonableness.*] By a by-law made by a tramway company, and enforceable by a penalty, "Each passenger shall shew his ticket (if any) when required so to do to the conductor or any duly authorized servant of the company." A passenger, having paid the fare and received a ticket, refused to shew it to an inspector of the company, and was summoned for breach of the by-law:—*Held*, that the by-law was not unreasonable, and that the passenger ought to have been convicted. LOWE *v.* VOLP - - 256

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VOLUNTEER CORPS—*Power to make Rules—Failure of Volunteer to become efficient—Loss of Capitation Grant—Rule ultra vires—Volunteer Act*, 1863 (26 *&* 27 *Vict. c.* 65), *s.* 24.] By s. 24 of the Volunteer Act, 1863, "The officers and volunteers belonging to a volunteer corps may from time to time make rules for the management of the property, finances, and civil affairs of the corps."—A volunteer corps made (inter alia) the following rule: "Any . . . . member of the corps who shall fail to make himself efficient and to earn the Government capitation grant . . . . shall pay to the funds of the corps a sum equal to the amount of Government capitation grant which he has in consequence failed to earn":—*Held*, that there was no power under the section to make such a rule, and that it was therefore ultra vires. THE QUEEN *v.* LEWIS AND MOSS - - 665

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WATERWORKS—*Metropolis—Supply—Constant Supply—Default by Company—Penalties—Who may take Proceedings—Metropolis Water Act*, 1871 (34 *&* 35 *Vict. c.* 113), *ss.* 7, 16, 44 *and* 45.] When a metropolitan water company has provided a supply of water for a district, under s. 7 of the Metropolis Water Act, 1871, a private individual cannot take proceedings against the company for the penalties, imposed by s. 16, for refusing or neglecting "to provide and keep . . . . a con-

WATERWORKS—*continued.*
stant supply of pure and wholesome water sufficient for the domestic purposes of the inhabitants." Such proceedings can only be taken by the metropolitan authority within the jurisdiction of which the penalty has been incurred. KYFFIN *v.* EAST LONDON WATER COMPANY - - 446

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